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APPENDIX

FILED

FEB 26 1970

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1970

No. 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,
Plaintiffs-Appellants,

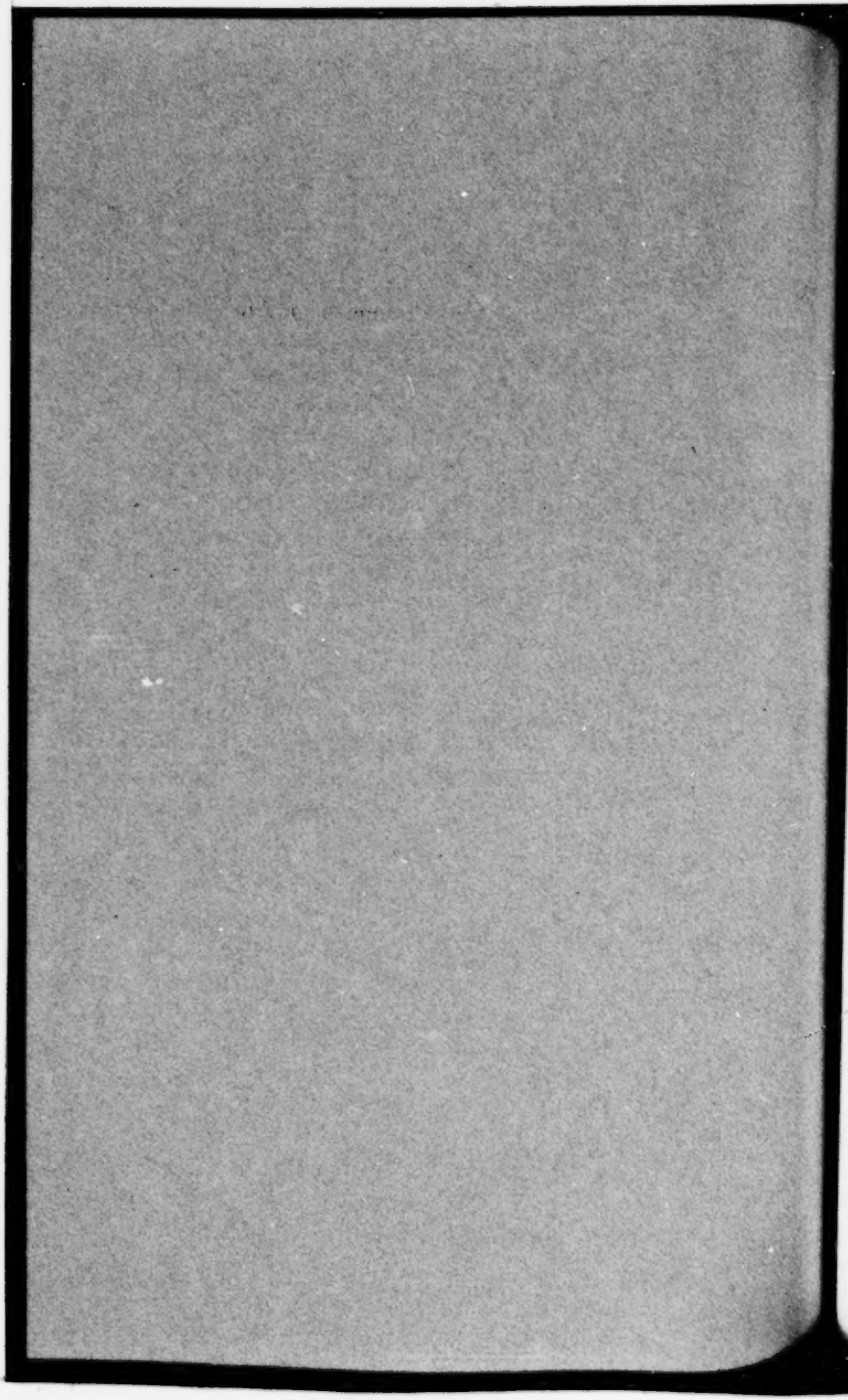
v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

Filed October 6, 1969

Probable Jurisdiction Noted January 12, 1970



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UNITED STATES DISTRICT COURT
For the Southern District of New York

68 Civ. 2917

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., TOBY B. GOLICK, JAMES C. MAURO, JR. and WILLIAM H.B. RODARMOR on behalf of themselves and all other persons similarly situated,

Plaintiffs,

—*v.*—

LOWELL WADMOND, FELIX A. MULDOON, EDWIN L. WEISL, MARK F. HUGHES, BRUCE BROMLEY, MONROE GOLDWATER, ARTHUR H. SCHWARTZ, BERNARD TRENCHER, THOMAS B. DYETT and ALFRED A. GIARDINO as Chairman and members of the Appellate Division First Department Committee on Character and Fitness of Applicants for Admission to the Bar, THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT,

Defendants.

Docket Entries

Date	Proceedings
July 16, 1968	– Filed complaint and issued summons.
July 18, 1968	– Mailed Notice of Motion re: 3 Judge Court. Ret. 7/30/68.
Aug. 23, 1968	– Filed Order to Show Cause re: Judgment, etc. Ret. 8/27/68, and affidavit in support thereof.
Aug. 26, 1968	– Filed affidavit in opposition to motion to convene a 3-judge court, etc.

Docket Entries

Date	Proceedings
Aug. 26, 1968 –	Filed Brief of Attorney General in opposition to motion to convene a 3-judge court, etc.
Aug. 26, 1968 –	Filed ANSWER of defendants.
Sept. 25, 1968 –	Filed OPINION #35221. Motley, J. ***The motions to convene three-judge courts are granted and the cases are referred herewith to the Chief Judge of the Circuit.––Plaintiff's motion in 68 Civ. 2917 to consolidate the two suits (68 Civ. 2938) is improperly presented at this time. The motion to consolidate is denied without prejudice to its renewal before either three-judge court. So ordered (mailed notice) (Also in 68 Civ. 2938).
Sept. 30, 1968 –	Filed Designation of Judges to hear and determine said causes in addition to Hon. Constance Baker Motley: Hon. Henry J. Friendly, U.S.C.J., Hon. Dudley B. Bonsal, U.S.D.J. Lumbard, Ch. J. U.S.C.A. (Also in 68 Civ. 2938).
Oct. 30, 1968 –	Filed Notice of Motion Ret. 11/1/68 at 11:45 A.M. in the Court of Appeals Court Room, 17th Floor re: dismiss complaints, etc. (3-Judge Court) (Filed in 68 Civ. 2938).
Oct. 31, 1968 –	Filed Plaintiffs' Memorandum of Law before 3-Judge Court.
Nov. 1, 1968 –	Filed Amended Complaint.
Nov. 1, 1968 –	Before 3 Judge Court, FRIENDLY, C. J., BONSAL, D.J. and MOTLEY, D.J. Hearing on Motions adjourned to 11/13/68 at 3:30 P.M.
Nov. 12, 1968 –	Filed defts' memorandum in opposition to pltffs' motion for summary judgment.

Docket entries

Date	Proceedings
Nov. 12, 1968	– Filed Affidavits and 9(g) Statement. (Also in 68 Civ. 2938).
Nov. 13, 1968	– Before Statutory Court –– hearing held & concluded – decision reserved.
Nov. 14, 1968	– Filed Second AMENDED COMPLAINT.
Nov. 25, 1968	– Filed Plaintiffs' Reply Memorandum.
Feb. 17, 1969	– Filed OPINION NUMBERS 35615A and 35615B by FRIENDLY, C.J., BONSAL and MOTLEY. (Also in 68 Civil 2938).
Mar. 17, 1969	– Filed ORDER TO SHOW CAUSE – Ordered that defts show cause on Mar. 21, 1969 in the Court of Appeals Court room at 4:00 why an order should not be made granting Pltffs rehearing of motions and entering an order dismissing the complaint. Motley J.
May 15, 1969	– Filed report with notice of Filing.
May 21, 1969	– Filed Plaintiff Wexler, *et al.* Response. (Also in 68 Civil 2938).
May 29, 1969	– Filed Defendants Reply to Plaintiffs' Response dated 5/20/69.
June 16, 1969	– Filed JUDGMENT. Ordered that:

1. This Court was properly convened and has jurisdiction.
2. New York State statutes etc. do not violate the 14th Amendment.
3. Question 27(a) is further revised as indicated.
4. Motions of plts. and defts. are granted to the extent herein provided, and are otherwise denied.

Date	Proceedings
	5. No party shall recover costs. Bonsal, J. (JUDGMENT ENT. 6/16/69). Ent. 6/18/69. (Also in 68 Civ. 2938). (mailed notice).
Aug. 8, 1969	– Filed pltffs. NOTE OF APPEAL U.S. Supreme Court of the U.S.

UNITED STATES DISTRICT COURT
For the Southern District of New York
68 Civ. 2938

STEPHEN MARTIN WEXLER, H. GABRIEL KAIMOWITZ, ROBERT M. COVER, THE COLUMBIA LAW STUDENTS GUILD, NEW YORK CITY CHAPTER OF NATIONAL LAWYERS GUILD,

Plaintiffs,

—v.—

THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, First Judicial Department, and BERNARD BOTEIN, as Presiding Justice, JAMES B. M. McNALLY, BENJAMIN J. RABIN, ARON STEUER, GEORGE TILZER, HAROLD STEVENS, SAMUEL W. EAGER, LOUIS J. CAPPOZZOLI, OWEN McGIVERN, as Associate Justices; THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, Second Judicial Department, and GEORGE J. BELDOCK, as Presiding Justice, A. DAVID BENJAMIN, ARTHUR D. BRENNAN, MARCUS G. CHRIST, SAMUEL RABIN, FRED J. MUNDER, JAMES D. HOPKINS, M. HENRY MARTUSCELLO, as Associate Justices; THE COMMITTEE ON CHARACTER AND FITNESS, Supreme Court of the State of New York, Appellate Division, First Judicial Department, and LOWELL WADMOND, as Chairman, BRUCE BROMLEY, THOMAS B. DYETT, ALFRED A. GIARDINO, MONROE GOLDWATER, MARK F. HUGHES, ARTHUR H. SCHWARTZ, BERNARD TRENCHER, EDWIN L. WEISL, as Members; THE COMMITTEE ON CHARACTER AND FITNESS, Supreme Court of the State of New York, Appellate Division, Second Judicial Department, and EDWARD A. VOSSELER, as Chairman, BERNARD J. FERGUSON, REGINALD C. SMITH, RICHARD J. MALONEY, EDWARD B. BERMAS, ROBERT R. SUGARMAN, WILLIAM R.L. COOK, OSCAR KATZ, DAVID R. SIEGEL, ROY M.D. RICHARDSON, FRANK J. LYNCH, JR. as Members,

Defendants.

Docket Entries*

Date	Proceedings
July 17, 1968 –	Filed complaint and issued summons.
Aug. 9, 1968 –	Filed Notice of Motion re: Convene 3-Judge Court, etc. Ret. 8/20/68.
Aug. 9, 1968 –	Filed Memorandum in support of motion for 3-Judge Court.
Aug. 26, 1968 –	Filed ANSWER of defts to complaint.
Aug. 26, 1968 –	Filed Affidavit by Atty. Genl. in opposition to motion to convene 3-judge court.
Aug. 26, 1968 –	Filed Brief of Attorney General in opposition to motion to convene 3-judge court.
Oct. 31, 1968 –	Filed Supplemental Memorandum in support of motion for pre. injun.
Nov. 7, 1968 –	Filed Amended Complaint.
Nov. 25, 1968 –	Filed Plaintiffs' Reply Memorandum.

*These entries are limited to those papers filed and actions taken exclusively with respect to 68 Civ. 2938. All other relevant docket entries were made after consolidation of this case with 68 Civ. 2917 and are listed appropriately *supra* at pp. 2-4.

SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
Southern District of New York

---

68 Civ. 2917

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., TOBY B. GOLICK, JAMES C. MAURO, JR. and WILLIAM H.B. RODARMOR on behalf of themselves and all other persons similarly situated,

Plaintiffs,

—against—

LOWELL WADMOND, FELIX A. MULDOON, EDWIN L. WEISL, MARK F. HUGHES, BRUCE BROMLEY, MONROE GOLDWATER, ARTHUR H. SCHWARTZ, BERNARD TRENCHER, THOMAS B. DYETT and ALFRED A. GIARDINO as Chairman and members of the Appellate Division First Department Committee on Character and Fitness of Applicants for Admission to the Bar, THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND OTHER RELIEF

Plaintiffs, as and for their second amended complaint, respectfully allege:

JURISDICTION

1. Plaintiffs bring this action for declaratory and injunctive relief, pursuant to 28 U.S.C. §§ 1343, 2201, 2202, 2281, pursuant to 42 U.S.C. § 1983, and pursuant to the inherent power of this Court to control admission of attorneys to its Bar.

Plaintiffs seek relief under the following amendments to the Constitution of the United States: First, Fifth, Sixth, Ninth and Fourteenth.

2. Plaintiffs bring this action on their own behalf and on behalf of all persons who are law students and plan to apply for admission to the Bar of the State of New York and on behalf of all persons, whether or not they are now law students, who plan to apply for admission to the Bar in the State of New York. Such class is a class too numerous to bring before the Court and the rights of all members of that class will be adequately represented by the plaintiffs.

3. Plaintiff, LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., (hereinafter "the Council") is a non-profit membership corporation, organized under the laws of the District of Columbia, with its principal office at 156 Fifth Avenue, New York, New York.

Its Articles of Incorporation provide, as its principal objectives, that the corporation shall:

"engage in non-partisan research, study and analysis of the law with a view to eliminate prejudice and discrimination; to defend human and civil rights secured by law; and to make public the conclusions reached through such studies." The articles also provide that the corporation shall "provide a civil rights program where students may study with and assist members of the legal profession in the civil rights field on behalf of indigent, poor and distressed, or underprivileged litigants on civil rights cases."

The membership of the Council is composed of approximately 1,500 law students from sixty law schools throughout the country. There are chapters of the Law Students Civil Rights Research Council in the City of New York at the Law Schools of Brooklyn, Columbia, Fordham and New York University.

Among the members of the Council there are many who are residents in the First Judicial Department and who have either applied or intend to apply for membership in the New York Bar in said Department.

Pursuant to the provisions of its Articles of Incorporation, the Council actively seeks to involve law students in the work of civil rights, civil liberties and poverty organizations and of attorneys active in these areas throughout the country. The Council's work can succeed only if law students may freely engage themselves in these efforts while and before entry into law school uninhibited by the fear of subsequent delay in or denial of admission to practice because of prior involvements and associations. This being the case, the Council and its members have a direct interest in judicial administration, particularly as it relates to the process for admission to the Bar of this Court, which incorporates the procedures, rules, regulations and practices set forth for admission to the Bar of the State of New York and Rule 3, General Rules, United States District Courts for the Southern and Eastern Districts of New York.

As specifically related to its members, the Council sues on behalf of those who are or will be applying for admission to the Bar of the State of New York and whose exercise of the rights of speech and association is or may be threatened, deterred and restricted by their fears of being refused or delayed admission to the Bar because of their activities before and while in law school.

4. The individual plaintiffs herein plan to apply for admission to the Bar of New York State upon graduation from law school. The plaintiffs bring this action in their own behalf and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

5. Defendants, LOWELL WADMOND, FELIX A. MULDOON, EDWIN L. WEISL, MARK F. HUGHES, BRUCE BROMLEY, MONROE GOLDWATER, ARTHUR H. SCHWARTZ, BERNARD TRENCHER, THOMAS B. DYETT, and ALFRED A. GIARDINO are sued in their capacities as Chairman and members respectively of the Committee on Character and Fitness for the First Judicial Department of New York State. The Supreme Court, Appellate Division, First Department is given the power by Section 90 of the Judiciary Law to admit attorneys to the practice of law.

STATUTES AND RULES

6. Admission to the bar in the First and Second Judicial Departments of New York State is governed by Rules 9401, 9404 and 9406 of the New York Civil Practice Law and Rules, § 90 of the Judiciary Law of the State of New York, Rule Eight of the Rules for Admission of Attorneys and Counselors-at-Law of the Court of Appeals and part 3, Rule I of the Rules of the Supreme Court, Appellate Division, First Department. The relevant portions of these statutes are set forth below:

Rule 9401 of the New York Civil Practice Law and Rules, entitled "Committee," provides in pertinent part that:

> The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state.

Rule 9404 of the New York Civil Practice Law and Rules, entitled "Certificates of Character and Fitness," provides that:

> unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specific[ ] his present and such past places of actual residence, [as] may be required by the committee and the appellate division, listing the street and number, if any, and the period of time he resided at each place.

Rule 9406 of the New York Civil Practice Law and Rules, entitled "Proof," provides in pertinent part that:

> No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counsellor-at-law in the courts of this state, unless he shall furnish satisfactory proof to the effect:
>
> 1. that he believes in the form of government of the United States and is loyal to such government. . . .

Section 90 of the Judiciary Law of New York State provides, in part, that:

> 1.a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied

that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

Rule VIII of the Rules for Admission of Attorneys and Counsellors-at-Law of the Court of Appeals entitled "Proof of moral character", reads as follows:

VIII-1 *General regulation.* Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counsellor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2 *Supporting Affidavits.* Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

VIII-4 *Discretion of Appellate Division.* The justices of the Appellate Division in each department shall adopt

for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

Part 3 of the Rules of the Supreme Court, Appellate Division, First Department, provides:

> Rule 1. *Applications Under Rule VII of the Court of Appeals.*
>
> 1. Every application for admission to practice as an attorney and counsellor-at-law under Rule VII of the Rules of the Court of Appeals for admission of attorneys and counsellors-at-law shall, in addition to the proof required by said rule, and by Article 94 CPLR, present to the court proof of the qualifications required for the admission of an attorney and counsellor-at-law in the state in which he had been admitted and had practiced, and the nature of the examination required of an applicant for admission to practice as an attorney and counsellor-at-law in such state.
>
> 2. Every application for admission to practice under Rule VII of the Rules of the Court of Appeals for the admission of attorneys and counselors-at-law shall be referred to the Committee on Character and Fitness who shall report to the court upon the character and qualifications of the applicant to be admitted to practice in the courts of this state, and no person shall be admitted to practice on such an application until after the Committee on Character and Fitness shall have made its report.

7. The General Rules of the United States District Courts for the Southern and Eastern Districts of New York provide in Rule 3 that a person may be admitted to practice in those

courts if he has been a member in good standing of the New York Bar for one year.

8. The questionnaire used presently in the First Department is attached to and made part of this complaint as Exhibit "A". Questions 26 and 27, among others, are particularly relevant to the claims of law which follow.

THE FACTS

9. Preceding the determination that an individual possesses the requisite good moral character and general fitness which are required for admission to the Bar, the Committee on Character and Fitness conducts individual interviews with the applicants. During such interviews, on the basis of the applicant's answers to the questionnaire or on the basis of other information, the applicant is subjected to questions on a wide range of subject matter which may and often does include his personal, political and religious beliefs and his prior and his present associations with any organizations, without regard to remoteness in time or relevance to professional qualifications.

10. The statutory scheme, including the questionnaire and interviewing procedures, is void on its face and as applied, in that:

(a) It creates a chilling effect upon the exercise of the rights of free association and expression protected by the First and Fourteenth Amendments to the United States Constitution.

(b) It unlawfully inquires into religious, political and other associations, beliefs, and private matters in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(c) It unlawfully delegates, by means of overly broad, vague and unascertainable standards the authority to the defendants to deprive plaintiffs and their class of admission to the Bar, in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution.

(d) It denies to plaintiffs the right to a fair hearing and other procedural safeguards guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

(e) It violates due process of law and freedom of speech by placing on plaintiffs the burden of proving their loyalty and belief in the form of government of the United States, in violation of the First and Fourteenth Amendments to the United States Constitution.

(f) It unlawfully inquires into associations out of which incrimination might arise, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

(g) It unlawfully tends to keep from admittance to the Bar and from seeking admittance to the Bar a class or category of lawyers whose consequent unavailability to the clients seeking such attorneys deprives such attorneys and clients of rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

(h) It undermines the vigor and independence of the bar in derogation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(i) It unconstitutionally interferes with the proper functioning of the bar of this court and of other United

States District Courts, in that the bulk of its members are screened for admission by the procedures outlined above.

11. Plaintiffs and their class are being damaged and will continue to be so unless the relief sought herein is granted. Individual plaintiffs have been, are being, and will continue to be deterred from freely expressing orally and in writing their thoughts and opinions on a variety of political and other subjects and from freely associating with other persons and groups for fear that such associations and expression, learned of by defendants or their successors in office, will hamper, delay or make impossible their admittance to the Bar of this Court. The corporate plaintiff is suffering and will continue to suffer from the inhibiting effect of the procedures for admission to the Bar in the State of New York in the First and Second Judicial Departments in that persons who would otherwise become members of plaintiff or work with plaintiff to achieve its purposes are chilled and deterred from doing so.

12. Plaintiffs have no adequate remedy at law.

WHEREFORE, it is prayed that the following relief be granted.

1. The convening of a special United States District Court of three judges to hear and determine this action, pursuant to Sections 2281 and 2284 of Title 28 of the United States Code.

2. The issuance of a declaratory judgment defining the constitutional rights of the plaintiffs and invalidating those parts of the statutory scheme for admission to the Bar of New York State which violate the constitutional rights of plaintiffs and the class they represent in the manner above described.

3. The granting of a preliminary and permanent injunction restraining the defendants, their agents and employees

from further violation of the said constitutional rights of plaintiffs and the class they represent through the use of questionnaires and personal interviews or in any other manner.

4. The granting of such other relief as the Court may deem proper.

JEREMIAH S. GUTMAN
363 Seventh Avenue
New York, N. Y. 10001

ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y. 10010

STEVEN J. GOLDSMITH
71 Worth Street
New York, N. Y.

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Form A (1M-7-68) 7801 94

DEAD-LINE FOR SUBMISSION_____

Applicant's Office Telephone..... ISSUED.....

Applicant's Home Telephone..... SUBMITTED.....

Appelate Division, Supreme Court
First Judicial Department
Committee on Character and Fitness
of
Applicants for Admission to the Bar

APPLICATION FOR ADMISSION TO THE BAR AND STATEMENT REQUIRED PURSUANT TO ARTICLE 94 OF THE CIVIL PRACTICE LAW AND RULES

DIRECTIONS

(Read all these directions carefully before attempting to answer any question.)

1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.

2. Answers must be in black ink, preferably in typewriting, but may be in applicant's handwriting.

3. *Unless otherwise indicated, every question and every part of each question must be answered, even though the answer be negative.*

4. Where "Yes" or "No" suffices, employ that form in answer.

5. If the applicant cannot comply with any of the requirements, he must state in detail the efforts he has made to comply and why he cannot. Answers on information and belief will be accepted only in connection with matters which the applicant cannot be expected to remember because of extreme youth or other equally sufficient reason. All statements made on information and belief must be so designated in the *sworn statement, and the sources of information must be given.*

6. Should the space left for any answer be insufficient, the applicant shall complete his answer on a rider, attached to page 11 hereof, specifying the number of the question to which it relates. Each rider page should be signed. Avoid riders whenever possible.

7. In stating addresses give street and number, if any, city, village, county and state or country.

8. In giving a period which is continuing at the date of verification of this sworn statement, always give such period as continuing "to date."

TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT:

The undersigned hereby applies for admission to practise as an attorney and counselor-at-law in all courts of the State of New York, and in support of such application submits the following sworn statement and the accompanying affidavits and other papers:

1. (a) State name in *full* _____
(First) (Middle) (Last)

(b) Have you ever used or been known by any other name?_____If so, state in full each name (other than the name above given) which you have used or by which you have at any time been known, the period of, and the reasons for, the use of each such name. (If change of name was made by court order, submit copy of petition, a certified copy of the order and certificate of compliance therewith; if by marriage, submit copy of marriage certificate.)

2. State the following:

(a) Age, date, and place of birth.

OVERSIZE PAGE SEE NEXT FRAME

APPLICATION FOR ADMISSION TO THE BAR AND STATEMENT REQUIRED PURSUANT TO ARTICLE 94 OF THE CIVIL PRACTICE LAW AND RULES

DIRECTIONS

(Read all these directions carefully before attempting to answer any question.)

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TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT:

The undersigned hereby applies for admission to practise as an attorney and counselor-at-law in all courts of the State of New York, and in support of such application submits the following sworn statement and the accompanying affidavits and other papers:

1. (a) State name in *full* ..... (First) (Middle) (Last)

(b) Have you ever used or been known by any other name? ..... If so, state in full each name (other than the name above given) which you have used or by which you have at any time been known, the period of, and the reasons for, the use of each such name. (If change of name was made by court order, submit copy of petition, a certified copy of the order and certificate of compliance therewith; if by marriage, submit copy of marriage certificate.)

2. State the following:

(a) Age, date, and place of birth.

(b) If you are a naturalized or derivative citizen, the date when and place where naturalization or right to derivative status was acquired, and exhibit certificate of naturalization or equivalent from any governmental office. (Such certificate will be returned.)

(c) Present residence (full mailing address).

(d) Full name of all persons with whom you are presently living, and relationship to you.

(e) Length of actual residence in the State of New York.

3. State whether married or single. If ever married, answer the following:

(a) When, where, and to whom married; give spouse's full name, together with any other name by which spouse has been known. (If married more than once, list marriages chronologically.)

(b) Do you reside with your spouse?..... If not, state reasons for separation (if through divorce, annulment or separation, submit copy of pleadings, certified copy of decree, judgment or order and proof of compliance with any directive portions thereof).

4. Give the following information relating to your parents:

	Father	Mother
(a) Name in full		
(b) Born in United States (Yes or No)		
(c) Living or not (Yes or No)		
(d) Residence		
(e) Present, or if retired or deceased, most recent occupation		

5. Give the following information as to residence.

(a) The cities and states or countries in which you resided for more than three months from the date of your birth until you first entered high school or its equivalent. (If answer is on information and belief, state source of information.)

(b) The full and exact address of your residence at the time you first entered high school or its equivalent.

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	Father	Mother
(a) Name in full		
(b) Born in United States (Yes or No)		
(c) Living or not (Yes or No)		
(d) Residence		
(e) Present, or if retired or deceased, most recent occupation		

5. Give the following information as to residence.

(a) The cities and states or countries in which you resided for more than three months from the date of your birth until you first entered high school or its equivalent. (If answer is on information and belief, state source of information.)

(b) The full and exact address of your residence at the time you first entered high school or its equivalent.

(c) State every permanent and temporary residence you have ever had, in the United States or elsewhere, since first entering high school or its equivalent with exact address of each, and the month and year of the beginning and ending of each such residence. (Exclude military addresses, unless off base.)

Permanent Residences

(List same chronologically beginning with the earliest date. *Temporary residences*, which are residences *away from home* for educational, business or other special purposes, are to be listed on next page. *Do not interrupt the continuity of the periods of permanent residence by subtracting periods of temporary residence.*)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county	State or Country

(Continue permanent residences if necessary, and give temporary residences on next page.)

(Permanent Residences Continued)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county	State or Country

Temporary Residences

(These include only residences **away from home** for educational, business or other special purposes except summer vacations. Do not interrupt continuity of periods or permanent residence, to be given above, **by subtracting periods** of temporary residence.)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county	State or Country

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Temporary Residences

(These include only residences **away from home** for educational, business or other special purposes except summer vacations. Do not interrupt continuity of periods or permanent residence, to be given above, **by subtracting periods** of temporary residence.)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county	State or Country

6. List **all schools** below college grade attended, giving **month and year** of the beginning and ending of attendance at each.

Name or designation of school	City, town or county	State	Month and year

Did you graduate from high school?_____ Date of graduation_____

7. List **college or colleges** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and Ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Sessions (Full-time day or evening)

8. If you did not receive a college degree before entering low school, give date of filing Law Student's Qualifying Certificate_____.

9. List **law schools** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and Ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Sessions (Full-time day or evening)

10. List any other schools attended or courses of study pursued, in addition to those hereinabove mentioned.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and Ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Sessions (Full-time day or evening)

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8. If you did not receive a college degree before entering low school, give date of filing Law Student's Qualifying Certificate_____.

9. List **law schools** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and Ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Sessions (Full-time day or evening)

10. List any other schools attended or courses of study pursued, in addition to those hereinabove mentioned.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and Ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Sessions (Full-time day or evening)

11. (a) Have you ever been denied admission to any school, college, law school, or other similar institution?

(b) Have you ever been placed on probation, or dropped, or suspended or expelled from, or have you withdrawn from or left, any institution of learning, **or otherwise been subjected to discipline for conduct or scholarship, by any such institution,** or requested or advised for any reason to discontinue your studies therein temporarily or otherwise?

If your answer is "Yes" to either (a) or (b), give the name of any such institution and state the circumstances and date of each such occurrence.

12. Have you ever been employed in a business, profession or occupation other than law?.....
If so, enumerate all such employments in chronological order. Include employments by members of family or other relatives and employments with or without monetary compensation. Submit letter on letterhead of employer or an affidavit from each such employer giving nature of employment, period of service, whether or not satisfactory and reason for termination.

Month and Year of Beginning and Ending of Period of Employment	Name of Employer (Individual, partnership or corporation. Do not give name of an agent of employer.)	Address of Employer (Give street, number, city or town and state or country.)	Nature of Employer's Business	Position or Positions held by Applicant	Reason for Termination

13. Have you ever been employed in or associated with any law office, law department or legal institution? If so, enumerate all such employments and associations in chronological order. Include employments by members of family or other relatives and employments with or without monetary compensation. Submit affidavit from each employer giving same information as required under question 12.

Name of Employer					

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13. Have you ever been employed in or associated with any law office, law department or legal institution? If so, enumerate all such employments and associations in chronological order. Include employments by members of family or other relatives and employments with or without monetary compensation. Submit affidavit from each employer giving same information as required under question 12.

Month and Year of Beginning and Ending of Period of Employment	Name of Employer (Individual, partnership or corporation. Do not give name of an agent of employer.)	Address of Employer (Give street, number, city or town and state or country.)	Nature of Employer's Business	Position or Positions held by Applicant	Reason for Termination

14. Have you ever been engaged on your own account in any occupation, business, or profession?.....

If so, give in detail the nature and location thereof and the **month and year** of the beginning and ending of your engagement in or connection therewith. If any such business was carried on by you in partnership with others, give the names and addresses of all partners and the nature of the business. If the business was carried on by a corporation in which you owned an interest state its name, address, nature of the business and your connection with it. If any business or profession in which you were engaged has been discontinued or your connection therewith has ceased state whether and why there are unpaid judgments, debts or claims or pending litigation.

15. Have you ever been discharged by any employer?.....

If so, give the name of each such employer stating date, cause and circumstances of discharge.

16. Do you affirmatively represent that, in connection with all your employments for which no proof has been supplied, your services were satisfactory and that you were not discharged nor were your services terminated for cause, nor were you requested or advised to resign from or leave any such position? ..... If answer is "No" give full details as to each such incident.

17. (a) Have you ever heretofore applied for admission to the Bar of the State of New York? .....

(b) Have you ever engaged in or has your conduct ever been called into question with reference to the unauthorized practice of law? .....

(c) Have you ever been employed by or otherwise connected with any person, firm, or corporation whose conduct was called into question on the subject of unauthorized practice of law while you were so employed or connected?

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15. Have you ever been discharged by any employer?.....

If so, give the name of each such employer stating date, cause and circumstances of discharge.

16. Do you affirmatively represent that, in connection with all your employments for which no proof has been supplied, your services were satisfactory and that you were not discharged nor were your services terminated for cause, nor were you requested or advised to resign from or leave any such position? ..... If answer is "No" give full details as to each such incident.

17. (a) Have you ever heretofore applied for admission to the Bar of the State of New York? .....

(b) Have you ever engaged in or has your conduct ever been called into question with reference to the unauthorized practice of law? .....

(c) Have you ever been employed by or otherwise connected with any person, firm, or corporation whose conduct was called into question on the subject of unauthorized practice of law while you were so employed or connected? .....

(d) Have you ever tried any action or proceeding, argued any motion, drawn legal papers, given legal advice or held yourself out as an attorney or counselor-at-law in this State? .....

If your answer is "Yes" as to any part of this question, state the matter fully.

18. (a) Have you ever registered as a law student, or applied to take or taken the bar examination in any country, state or jurisdiction other than the State of New York?.....

(b) Have you ever applied for admission to practice as an attorney or counselor in any country, state or jurisdiction other than the State of New York?.....

If your answer to (a) or (b) is "Yes," state specifically the disposition made of the application or the result of the bar examination. If admitted, state (a) the name and address of each court by which admitted, the date of such admission, the periods of practice and all the office addresses where you have practiced, with the names and addresses of partners, if any, and (b) whether you have ever been reprimanded, disciplined, suspended, or disbarred as an attorney or counselor-at-law, or whether any charges or complaints have ever been preferred against you, and if so, the nature of the charges and their disposition.

(Applicants admitted in other jurisdictions must submit a certificate of admission and good standing at the Bar of each court to which admitted and a letter from each Grievance Committee, or body entertaining complaints against lawyers, certifying as to whether charges have been filed with such Committee or body against the applicant, and, if so, the substance of charges and the disposition thereof.)

19. Are you registered for Selective Service? If so, state local board number and address, your present classification and, if classification has been changed, previous classification and date of change.

20. Have you ever been rejected for service in any of the armed forces of the United States or of any other country? If your answer is "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photocopy of any documentary proof thereof.

21. (a) Have you at any time or in any manner, served in any of the armed forces of the United States, including reserves? If the answer is "Yes," state (1) when, where, and which service; (2) period and nature of service rendered; (3) if discharged give date and nature of discharge and submit photocopy of each release or discharge certificate.

(b) Have you served in the armed forces (reserves or otherwise) of any country other than the United States of America? If the answer is "Yes", give name of country, inclusive dates of service, and reason for separation from service. (Submit photocopy of each discharge or release.)

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19. Are you registered for Selective Service? If so, state local board number and address, your present classification and, if classification has been changed, previous classification and date of change.

20. Have you ever been rejected for service in any of the armed forces of the United States or of any other country? If your answer is "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photocopy of any documentary proof thereof.

21. (a) Have you at any time or in any manner, served in any of the armed forces of the United States, including reserves? If the answer is "Yes," state (1) when, where, and which service; (2) period and nature of service rendered; (3) if discharged give date and nature of discharge and submit photocopy of each release or discharge certificate.

(b) Have you served in the armed forces (reserves or otherwise) of any country other than the United States of America? If the answer is "Yes", give name of country, inclusive dates of service, and reason for separation from service. (Submit photocopy of each discharge or release.)

22. As a member of any armed forces have you been the subject of any charges or complaints, formal or informal, or have any proceedings been instituted against you, or have you been a defendant in any court martial proceeding? If answer is "Yes," state the facts.

23. State whether you ever have

(a) testified or been called as a witness in any action, proceeding or investigation to which you were not a party? _____

(b) been ticketed, or summoned, or arrested, or taken into custody, or indicted, or convicted, or tried for, or charged with, or pleaded guilty to, the violation of any law, ordinance, traffic or parking regulation or the commission of any felony or misdemeanor, or been requested to appear before any prosecuting or investigative agency in any matter? _____
(Indicate all such incidents, including proceedings as a juvenile or youthful offender, no matter how minor the infraction or whether guilty or not. Although a conviction may have been expunged from the records by order of court, it nevertheless should be disclosed in the answer to this question.)

(c) failed to answer on the return date any ticket, summons or other legal process served upon you at any time? _____ If so, was any warrant, subpoena, or further process issued against you as a result of your failure to respond to such legal process?

(d) been declared a ward of any court, or adjudged an incompetent, or had proceedings brought to have you declared a ward of any court or adjudged an incompetent; or have you been committed to or been a patient in any institution for the care of persons suffering from mental or nervous disorders or drug addiction, drug abuse or alcoholism? _____

(e) Been charged with fraud or any other act involving moral turpitude? _____

(f) been a party to or otherwise involved in any action, proceeding or investigation (civil or criminal) not covered by answers to the foregoing subdivisions hereof? _____

If your answer is "Yes" to any subdivision of this question indicate the subdivision and state the facts in detail below and give in each case name and locality of court or agency, dates of beginning and termination of action or proceeding, and the judgment or other disposition.

24. (a) Are there any unsatisfied judgments against you? If so, list the same giving name and address of judgment creditor and the court by which judgment was rendered, together with the date and amount thereof and the nature of the claim on which it was based.

(b) Are you in default in the performance or discharge of any duty or obligation imposed upon you by any governmental agency or decree or order of any court including alimony and support orders and decrees? _____ If so, state the facts.

(c) Are you indebted to anyone? If so, list all debts stating name and address of creditor and amount, date, nature and status of indebtedness.

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24. (a) Are there any unsatisfied judgments against you? If so, list the same giving name and address of judgment creditor and the court by which judgment was rendered, together with the date and amount thereof and the nature of the claim on which it was based.

(b) Are you in default in the performance or discharge of any duty or obligation imposed upon you by any governmental agency or decree or order of any court including alimony and support orders and decrees? ..... If so, state the facts.

(c) Are you indebted to anyone? If so, list all debts stating name and address of creditor and amount, date, nature and status of indebtedness.

(d) Has any one ever asserted as a matter of right a claim or demand against you which has not been made the subject of any action or legal proceeding? If so, state the facts and the present status of the matter.

(e) Have you ever asserted as a matter of right any claim or demand against any person, partnership or corporation, or governmental agency which has not been made the subject of any action or legal proceeding? ..... If so, state the facts and the present status of the matter.

25. (a) Have you ever held a license the procurement of which required proof of good character? ..... If so, as to each such license, state the date it was granted and the name and address of the authority granting it.

(b) If your application for such a license was not granted, state the facts.

(c) Have you ever held a bonded position? ..... If so, specify the nature of position, dates, amount of bond, and whether or not anyone ever sought to recover on your bond or cancel the same?

26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ..... If your answer is in the affirmative, state the facts below.

27. (a) Do you believe in the principles underlying the form of government of the United States of America? .....

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States? .....

28. (a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? ..... If so, state fully.

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(c) Have you ever held a bonded position?..... If so, specify the nature of position, dates, amount of bond, and whether or not anyone ever sought to recover on your bond or cancel the same?

26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ..... If your answer is in the affirmative, state the facts below.

27. (a) Do you believe in the principles underlying the form of government of the United States of America? .....

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States? .....

28. (a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or socal services? ..... If so, state fully.

(b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college, indicate approximate amount of time spent and responsibility involved.

29. (a) Give the names, addresses, objects and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges.

(b) Have you ever been disciplined, expelled, suspended, or ordered to resign from any club, association, society or organization?..... If your answer is "'Yes," state the facts.

30. If admitted do you intend to practice law?..... If you do not intend to practice law state why.

31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fiitness? If the answer is "Yes" state the facts.

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(b) Have you ever been disciplined, expelled, suspended, or ordered to resign from any club, association, society or organization?..... If your answer is "'Yes," state the facts.

30. If admitted do you intend to practice law?..... If you do not intend to practice law state why.

31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fiitness? If the answer is "Yes" state the facts.

32. (a) Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?.....

(b) Will you conscientiously endeavor to conform your professional conduct to them?.....

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THE FOLLOWING TWO PARAGRAPHS ARE TO BE COPIED BY THE APPLICANT IN HIS USUAL HANDWRITING IN THE SPACE PROVIDED BELOW:

I understand that this application is a continuing application, and that I must give correctly the information herein sought as of the date of my appearance before the Appellate Division to be sworn in as an attorney and counselor-at-law. I will, therefore, before such appearance, notify the Secretary of the Committee by affidavit as to any change in respect of any matter concerning which information is herein sought.

I will also submit such additional affidavits or papers, and supply such additional information as may be requested.

COPY FOREGOING TWO PARAGRAPHS HERE

Signature of applicant.....

(Must conform to name as it appears on Certificate of State Board of Law Examiners)

STATE OF .....
} ss.:
COUNTY OF .....

I, _____, being duly sworn, say: I have read the foregoing questions and have fully, truthfully and accurately answered the same. The foregoing answers are true of my own knowledge, except if stated to be made upon information and belief, and as to such answers, I believe them to be true.

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Signature of applicant.....

(Must conform to name as it appears on Certificate of State Board of Law Examiners)

STATE OF .....
} ss.:
COUNTY OF .....

I, _____, being duly sworn, say: I have read the foregoing questions and have fully, truthfully and accurately answered the same. The foregoing answers are true of my own knowledge, except if stated to be made upon information and belief, and as to such answers, I believe them to be true.

Signature of applicant.....

(Sign as above)

Subscribed and sworn to before me this day of , 19 .

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
Southern District of New York

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68 Civ. 2938

STEPHEN MARTIN WEXLER, H. GABRIEL KAIMOWITZ, ROBERT M. COVER, THE COLUMBIA LAW STUDENTS GUILD, NEW YORK CITY CHAPTER OF NATIONAL LAWYERS GUILD,

Plaintiffs,

—against—

THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, First Judicial Department, and BERNARD BOTEIN, as Presiding Justice, JAMES B. M. McNALLY, BENJAMIN J. RABIN, ARON STEUER, GEORGE TILZER, HAROLD STEVENS, SAMUEL W. EAGER, LOUIS J. CAPPOZZOLI, OWEN McGIVERN, as Associate Justices; THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, Second Judicial Department, and GEORGE J. BELDOCK, as Presiding Justice, A. DAVID BENJAMIN, ARTHUR D. BRENNAN, MARCUS G. CHRIST, SAMUEL RABIN, FRED J. MUNDER, JAMES D. HOPKINS, M. HENRY MARTUSCELLO, as Associate Justices; THE COMMITTEE ON CHARACTER AND FITNESS, Supreme Court of the State of New York, Appellate Division, First Judicial Department, and LOWELL WADMOND, as Chairman, BRUCE BROMLEY, THOMAS B. DYETT, ALFRED A. GIARDINO, MONROE GOLDWATER, MARK F. HUGHES, ARTHUR H. SCHWARTZ, BERNARD TRENCHER, EDWIN L. WEISL, as Members; THE COMMITTEE ON CHARACTER AND FITNESS, Supreme Court of the State of New York, Appellate Division, Second Judicial Department, and EDWARD A. VOSSELER, as Chairman, BERNARD J. FERGUSON, REGINALD C. SMITH, RICHARD J. MALONEY, EDWARD B. BERMAS, ROBERT R. SUGARMAN, WILLIAM R.L. COOK, OSCAR KATZ, DAVID R. SIEGEL, ROY M.D. RICHARDSON, FRANK J. LYNCH, JR. as Members,

Defendants.

Plaintiffs, for their amended complaint, allege:

1. This action arises under the Constitution of the United States, in particular, Article III and the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments thereto. The jurisdiction of this Court is based upon 28 U.S.C. §§1331, 1343(3), 2281, 2284; 42 U.S.C. §1983; upon this Court's inherent supervisory power over admission to its Bar, and upon Article III of the Constitution and the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments thereto.

2. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

3. This action is brought for declaratory relief pursuant to 28 U.S.C. §§2201 and 2202 and pursuant to 42 U.S.C. §1983 for a preliminary and permanent injunction against threatened acts and enforcement of certain unconstitutional statutes and regulations by defendants, which deprive plaintiffs, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States.

4. Plaintiff, STEPHEN MARTIN WEXLER, is 24 years of age, a natural born citizen of the United States, and has since his birth maintained a permanent residence in the State of New York. Plaintiff is married and has maintained a permanent residence in the Borough of Manhattan, City of New York, continuously from September, 1960 to the present. He graduated from a New York public high school on or about June, 1960, received a Bachelor of Arts degree from Columbia University on or about June, 1964, a Bachelor of Laws degree from New York University on or about June, 1967, and a Master of Laws degree on or about June, 1968, from New York University.

He was duly qualified to take the New York State Bar Examination held on July 14 and July 15, 1967, and was

certified as having passed said Bar Examination on October 26, 1967, a copy of the Certificate of the State Board of Bar Examiners is appended to and made a part of this complaint, as Exhibit "A". He has never been arrested and has never been suspended or dismissed from any school or university.

5. Plaintiff, H. GABRIEL KAIMOWITZ, is 33 years of age and a natural born citizen of the United States. He resided permanently in the State of New York from his birth to January, 1956. From January 26, 1956 to December, 1957, plaintiff maintained a permanent residence at 1980 Kalakaua Avenue, Honolulu, Territory of Hawaii. During this period the plaintiff served on active duty in the United States Army, from which he received an honorable discharge in November, 1960. From January, 1958 to February, 1960, plaintiff maintained a permanent residence in Decatur, Illinois, where he was employed as an editorial writer for the Decatur *Herald* and other newspapers. From March, 1960 to the present, plaintiff has maintained a permanent residence in New York City during which time he was employed as a writer and copy editor for the Scripps-Howard Newspaper Enterprise Association, New York City; as Managing Editor of the Stratford *News*, Stratford, Connecticut, as a free-lance writer; as a reporter for *Television Age* Magazine, New York City; and an associate editor of *Current* Magazine, New York City; and from September, 1964 to June, 1967, plaintiff attended and graduated from New York University Law School. Plaintiff, who is married and has two children, has maintained a permanent residence in Kings County from July, 1966 to the present.

Plaintiff graduated from a New York Public High School in February of 1952; received a B.S. Degree from the University of Wisconsin in June, 1955; and from June, 1958 to June, 1959 completed all course work toward an M.S. Degree in radio and television broadcasting at the University of Illinois.

In addition to his journalistic employment, plaintiff was employed as a teacher at the predominantly Negro Bishop College, Dallas, Texas, by the Southern Teaching Program of New Haven, Connecticut, during the summer of 1965.

Plaintiff is presently employed as a staff member of the Columbia University Center on Social Welfare Policy and Law, Legal Activities and Research Division.

Plaintiff has actively engaged in political and labor activities in connection with his employment and in his private life.

Plaintiff was duly qualified to take the New York State Bar Examination held on March 20 and March 21, 1968, and was certified as having passed said Bar Examination on May 14, 1968; a copy of the Certificate of the State Board of Bar Examiners is appended to and made a part of this complaint as Exhibit "B". He has never been arrested and has never been suspended of dismissed from any school or university.

5a. Plaintiff, ROBERT M. COVER, is 25 years of age and a natural born citizen of the United States. He resided permanently at 67 Kenwood Street, Brookline, Massachusetts from his birth on July 30, 1943, to 1966. From 1966 to the present, the plaintiff has maintained a permanent residency in Manhattan, first at 55 Tieman Place and since October of 1967 at 106 W. 96th Street. Plaintiff was married in October of 1967.

Plaintiff graduated from Princeton University with a Bachelor of Arts degree in June, 1965 and from Columbia University Law School with a Bachelor of Laws degree in June, 1968.

Plaintiff is presently employed as an Assistant Professor of Law at Columbia University Law School where he teaches Civil Procedure, Family Law, Federal Courts and a Seminar on Narcotics.

In the summer of 1963, plaintiff was convicted of "Distributing Handbills", a misdemeanor, in Albany, Georgia. The ordinance under which plaintiff was convicted was improperly applied against plaintiff because of his civil rights activities in Albany.

Plaintiff was duly qualified to take the New York State Bar Examination held on July 18 and 19, 1968 and has received a passing grade on said Bar Examination.

Plaintiff has never been suspended or dismissed from any school or university.

6. The plaintiffs, STEPHEN MARTIN WEXLER, H. GABRIEL KAIMOWITZ, and ROBERT M. COVER, desire and are fully qualified and fit under statutory and judicial regulations (Judiciary Law §90 and Civil Practice Law and Rules §9401, et seq. Rule VIII of the Rules of the New York Court of Appeals for admission of attorneys and Counselors-at-laws and Rule I, Pt. 4 of the Rules of the Appellate Division, First Judicial Department) to be admitted to the Bar of the State of New York, but are prevented by and will not submit to the process and practices of admission established by the defendants, acting under unconstitutional state statutes and rules and regulations made pursuant thereto which improperly and illegally condition admission on the plaintiffs' proving their belief in and loyalty to the government of the United States, on their disclosure of speech, associations, activities and beliefs, in violation of their rights to personal and political privacy guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution and on their meeting unconstitutionally vague and overbroad standards and qualifications respecting political beliefs, affiliations and speech.

7a. Plaintiff, The Columbia Law Students Guild, (hereinafter "the Student Guild") is a non-profit unincorporated

association of law students which shares with the National Lawyers Guild with which it is affiliated such common purposes as:

> "To promote reform in the law; (and) to facilitate the administration of justice . . . to aid in making the United States and the state constitutions, the law and the administrative and judicial agencies of government responsive to the will of the American people; to protect and foster our democratic institutions and the civil rights and liberties of all the people . . ."

The Student Guild has a membership of over 70 students at the Columbia University Law School. Many of these students reside in the First and Second Judicial Departments and have either applied or intend to apply for membership in the New York Bar in said Departments.

The Student Guild actively seeks to involve its members and other law students in the work of civil rights, civil liberties and poverty organizations and attorneys throughout the country. The Student Guild's efforts can succeed only if law students may freely engage themselves through membership in the Student Guild or otherwise in this work while in and before entry to law school, uninhibited by the fear of subsequent delay or denial of admission to practice because of affiliation with the Student Guild or other organizations or individuals. This being the case, the Student Guild and its members have a direct interest in judicial administration, particularly as it relates to the process for admission to the Bar of this Court, which incorporates the procedures, rules, regulations and practices set forth for admission to the Bar of the State of New York (Rule 3, General Rules, United States District Court for the Southern District of New York, see *infra*, paragraph 14) challenged as being unconstitutional on grounds hereinafter specified in paragraphs 15 through 19.

As specifically related to its members, the Student Guild sues on behalf of those who are or will be applying for admission to the Bar of the State of New York in either the First or Second Judicial Departments and whose exercise of the rights of speech and association is or may be threatened, deterred and restricted by their fears of being refused or delayed admission to the New York Bar because of their political activities while in or before entry to law school and the consequent delay in their admission to and exercise of their right to practice before the Bar of this Court.

7b. Plaintiff, New York City Chapter of National Lawyers Guild (hereinafter "City Chapter") is a non-profit membership corporation, organized under the laws of the State of New York. Plaintiff's office is located at 5 Beekman Street, New York City, New York. Its principal objects include those of the National Lawyers Guild referred to above, *infra*, paragraph 7a.

Plaintiff's membership includes attorneys licensed to practice in New York or elsewhere and residing in New York, and law students from the various law schools in and around New York City.

Plaintiff adheres to the statement of policy adopted by the National Lawyers Guild at the national convention in Santa Monica, California, in July, 1968 (annexed hereto and made a part of this complaint as Exhibit "C"), which places particular emphasis on the concern of lawyers with the war in Vietnam, the draft, racism, and the crises of poverty and the urban ghettos. The plaintiff seeks solutions to these problems through a radical change in the structure of the nation's legal, political and economic system. In this effort, plaintiff and its members have engaged and will engage in many activities not traditionally undertaken by other bar associations.

The work of the plaintiff can succeed only if law students and young attorneys may freely participate through membership in the City Chapter and otherwise to accomplish the needed legal, political, and economic changes, uninhibited by the fear of subsequent delay or denial of admission to practice because of affiliation with the City Chapter or involvement in activities of City Chapter and other organizations and individuals. The City Chapter on its own behalf and on behalf of its members, therefore, asserts a direct interest in judicial administration, particularly as it relates to the process of admission to the New York Bar and to the Bar of this Court, which incorporates the procedures, rules, regulations and practices set forth for admission to the Bar of the State of New York (Rule 3, General Rules, United States District Court for the Southern District of New York, see *infra*, paragraph 14) challenged as being unconstitutional on grounds hereinafter specified in paragraphs 15 through 19.

8. Under the New York Judiciary Law §90(1) the Appellate Divisions of the New York Supreme Court have the sole power to admit to practice applicants to the New York State Bar residing in their respective jurisdictions.

9. It is the rule and practice of the Appellate Divisions for the First and Second Judicial Departments that every application for admission shall be referred to the respective Committee on Character and Fitness, which is under a duty to report back to the Appellate Division its findings as to the character and qualifications of the applicant, and that "no person shall be admitted to practice on such an application until after the Committee on Character and Fitness shall have made its report." (Pt. 3, Rule I, Rules of the Appellate Division, First Department)

10. The Supreme Court, Appellate Division, and the Committee on Character and Fitness for the First Judicial

Department and the Justices or Members thereof have their principal offices in the Borough of Manhattan, New York City. The Supreme Court, Appellate Division, and the Committee on Character and Fitness for the Second Judicial Department and the Justices or Members thereof have their principal offices in the Borough of Brooklyn, New York City.

11. The Committees are charged, under Rule 9401 of the New York Civil Practice Law and Rules (hereinafter CPLR) with the duty of "investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state." The Committees are further authorized under CPLR Rule 9404 to prescribe and thereafter, as may become necessary, to amend, subject to the approval of the Justices of the Appellate Division a "Questionnaire and Statement" on which the applicant must set forth all the information and data requested. (Copies of the "Questionnaire and Statement" which the plaintiffs, STEPHEN MARTIN WEXLER, H. GABRIEL KAIMOWITZ, and ROBERT M. COVER are presently required to fill out are respectively appended to and made a part of this complaint as Exhibit "D" and "E".)

12. It is the rule and practice of the Committees that no application for admission will be considered or processed unless the "Questionnaire and Statement" is completely filled out and that failure to answer any question results in long delay or denial of admission to the Bar.

13. CPLR Rule 9406 provides in pertinent part:

> "No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts, unless he shall furnish satisfactory proof to the effect:
>
> "1. that he believes in the form of government of the United States and is loyal to such government".

14. Rule 3, General Rules, United States District Court for the Southern District provides in relevant part that no person shall be admitted to the Bar or this Court unless he has been "[a] member in good standing of the Bar of the State of New York, who has been such for at least one year."

15. (a) CPLR §§9401, *et seq.* Judiciary Law §90 and Rule VIII, Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law (Judiciary Law, Appendix) lack sufficient standards and are illegal and void in violation of the First, Fifth, Ninth and Fourteenth Amendments to the Constitution.

(b) CPLR §9406(1) is illegal and void in violation of the First, Fifth, Ninth and Fourteenth Amendments to the Constitution in that:

1. It improperly requires an applicant to the bar of the State of New York to bear an unlimited and indefinite burden of proof of his belief in and loyalty to the form of government of the United States;

2. Its terms are unreasonably vague and uncertain providing no ascertainable standards;

3. It improperly makes belief in the form of government of the United States a condition to admission to the bar; and

4. Belief in the form of government of the United States is not reasonably related to the legitimate objectives of the State, namely the determination that applicants to the bar "possess the character and fitness requisite for an attorney and counselor-at law" [New York Judiciary Law, §90(1)(a)].

(c) Questions 20 and 21(a) of Exhibit "D" and Questions 32 and 36 of Exhibit "E" are illegal, void and in

violation of the First and Fourteenth Amendments to the Constitution in that:

1. they are over-broad and without reasonable limitation;

2. they compel disclosure of political beliefs, associations, speech and activities protected by the First Amendment, and make such associations, speech and activities a factor to be considered in determining admission to the bar; and

3. they compel disclosure of religious activities, beliefs and associations and make such activities, beliefs and associations a factor to be considered in determining admission to the bar.

(d) Questions 22(A) and B and 23 of Exhibit "D" and Question 35 of Exhibit "E" are illegal, void and in violation of the First and Fourteenth Amendments to the Constitution, in that:

1. they are over-broad and without reasonable limitation;

2. they compel disclosure of political beliefs, associations, and activities protected by the First and Fourteenth Amendments; and make such beliefs, associations and activities a factor to be considered in determining admission to the Bar;

3. they compel disclosure of political activities, beliefs and associations without prior establishment of a proper evidentiary foundation for the inquiry;

4. the list of "subversive" organizations compiled by the Attorney General of the United States was formulated and adopted in violation of the First, Fifth and Fourteenth Amendments.

(e) The oaths prescribed in paragraphs "24(A) and (B)" of Exhibit "D" and paragraphs 33 and 34 of Exhibit "E" are illegal and void in that:

1. they are vague and ambiguous in violation of the First and Fourteenth Amendments;

2. the oaths and the essay required by paragraph 24(A) of Exhibit D and paragraph 33 of Exhibit E compel unlimited disclosure of beliefs, associations and activities in violation of the First and Fourteenth Amendments.

(f) The oaths prescribed and disclosures compelled by paragraph 38 of Exhibit "D" and paragraphs 30 and 39 of Exhibit "E" are illegal and void in that they are over-broad, unlimited and indiscriminate in violation of the First, Fifth and Fourteenth Amendments.

16. (a) It is the practice of the defendant Committees to conduct personal interviews of the applicant. These interviews have customarily involved inquiry by Committee members into an applicant's political activities, speeches and beliefs and other conduct of a personal and private nature; the basis for the inquiry often being a subjective reaction by the Committee member to an applicant's answer on the "Questionnaire and Statement" concerning speech, associations and beliefs protected by the First Amendment.

The personal interview conducted by the Committee is an unlimited and indiscriminate invasion of the privacy of an applicant's personal and political beliefs, associations and activities in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

(b) It is the practice of the defendant Committees require an applicant to obtain and submit affidavits of "character and home life" (forms for these affidavits which the

plaintiffs, STEPHEN MARTIN WEXLER and H. GABRIEL KAIMOWITZ, were required to submit are appended hereto and made a part of this complaint as Exhibits "F" and "G" respectively) which constitute an unlimited and indiscriminate invasion of the applicant's personal privacy in violation of the Fourth, Fifth, Ninth and Fourteenth Amendments.

17. All of the foregoing statutes, rules, regulations and practices have the effect of deterring and inhibiting the exercise of rights of speech, association and belief guaranteed by the First Amendment.

18. All of the foregoing statutes, rules, regulations and practices violate the Sixth and Fourteenth Amendment rights guaranteeing the effective assistance of counsel and the independence of the Bar.

19. The admission procedures as set out in statutes, rules and regulations and as put into practice by the defendants do not comply with due process of law guaranteed by the Fourteenth Amendment to the Constitution in that they permit denial or delay of admission to the Bar without providing for notice of charges, a full hearing at which counsel may be present, an opportunity for confrontation and cross-examination and specification of findings underlying the decision of the Committee and Court.

20. The plaintiffs have suffered and continue to suffer immediate serious and irreparable injury by reason of the operation and enforcement of the aforesaid state statutes for which there is no adequate remedy at law, in that the applicants and the members of the Student Guild and the City Chapter are and have been deterred, inhibited and restricted in the exercise of their political and other civil rights and if required to comply with the admission process, the applicants and the members of

the Student Guild and the City Chapter will be forced to choose between sacrificing and forfeiting their constitutionally protected rights to political and personal privacy, and delay or refusal in admission to the Bar of the State of New York and the Bar of this Court.

21. Unless this Court restrains the operations and enforcement of the unconstitutional state statutes, rules, regulations and practices, plaintiffs will continue to suffer the immediate, serious and irreparable injury above set forth.

22. No prior application has been made for the relief requested herein.

WHEREFORE, plaintiffs pray for the following relief:

1. That pursuant to 28 U.S.C. §§2281 and 2284, a three-judge Federal District Court be immediately convened to hear and determine this proceeding;

2. That a judgment issue declaring that Judiciary Law §90, CPLR §§9401, 9404, 9406, Rule VIII, Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law [Judiciary Law Appendix], and regulations and practices of the defendant Courts and committees as written and applied are illegal and void as violative of the Constitution of the United States; and

3. That a permanent injunction issue

(a) restraining the defendants from enforcing or operating under and pursuant to Judiciary Law §90, CPLR §§9401, 9404 and 9406 and Rule VIII, Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law [Judiciary Law, Appendix] and continuing the practices and procedures hereinbefore complained of;

(b) restraining the defendants from conditioning the issuance of a certificate of admission to the Bar of the State of

New York on the applicant's answering questions on the "Questionnaire and Statement", in the personal interview or in any other form or at any other time pertaining to their associations, speech, beliefs and activities protected by the First Amendment to the Constitution and to their personal conduct, the privacy of which is guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments; and

(c) mandating the issuance by the defendants of a certificate of admission to the Bar of the State of New York to the plaintiffs, STEPHEN MARTIN WEXLER, H. GABRIEL KAIMOWITZ, and ROBERT M. COVER.

RABINOWITZ, BOUDIN & STANDARD
By
Leonard B. Boudin
Attorneys for Plaintiffs
Office & P.O. Address:
30 East 42nd Street
New York, New York 10017

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State of New York

State Board of Law Examiners

Duplicate
No. A-47235

47/48
Amended Complaint: Exhibit A

To the APPELLATE DIVISION *of the* SUPREME COURT *of the State of New York for the*

FIRST *Judicial Department:—*

The State Board of Law Examiners *hereby certifies to the above-mentioned Appellate Division that*

STEPHEN MARTIN WEXLER *of* NEW YORK CITY

has, in accordance with the law and the rules of the Court of Appeals, qualified for examination by said Board for admission to practice as an Attorney and Counselor at Law in the Courts of Record of this State, and has taken and passed such examination.

Given at *Albany, New York, this* 26TH
day of OCTOBER *19* 68

John T. DeGraff

Chairman

Secretary

OF NEW

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of the State of New York for the

FIRST *Judicial Department:—*

The State Board of Law Examiners *hereby certifies to the above-mentioned Appellate Division that*

STEPHEN MARTIN WEXLER *of* NEW YORK CITY

has, in accordance with the law and the rules of the Court of Appeals, qualified for examination by said Board for admission to practice as an Attorney and Counselor at Law in the Courts of Record of this State, and has taken and passed such examination.

Given at *Albany, New York, this* 26TH *day of* OCTOBER *19* 68

STATE OF NEW YORK ★ BOARD OF LAW EXAMINERS ★

John T. DeGraff

Stanley H. Fuld

Arthur Kaufman

State Board of Law Examiners.

By Elizabeth L Connors
Clerk of the Board

State of New York

State Board of Law Examiners

No. A 48332

To the APPELLATE DIVISION *of the* SUPREME COURT *of the State of New York for the*

SECOND *Judicial Department:—*

The State Board of Law Examiners *hereby certifies to the above-mentioned Appellate Division that*

H. GABRIEL KAIMOWITZ *of* BROOKLYN

has, in accordance with the law and the rules of the Court of Appeals, qualified for examination by said Board for admission to practice as an Attorney and Counselor at Law in the Courts of Record of this State, and has taken and passed such examination.

Given at *Albany, New York, this* 14TH *day of* MAY *19* 68

John T. DeGraff

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SECOND *Judicial Department:—*

The State Board of Law Examiners *hereby certifies to the above-mentioned Appellate Division that*

H. GABRIEL KAIMOWITZ *of* BROOKLYN

has, in accordance with the law and the rules of the Court of Appeals, qualified for examination by said Board for admission to practice as an Attorney and Counselor at Law in the Courts of Record of this State, and has taken and passed such examination.

Given at *Albany, New York, this* 14TH *day of* MAY *19* 68

STATE OF NEW YORK BOARD OF LAW EXAMINERS

John T. DeGraff

Chauncey G. Parker

Arthur Kargen

State Board of Law Examiners.

By Elizabeth L. Connor
Clerk of the Board

PRESIDENT's POLICY STATEMENT ADOPTED AT THE NATIONAL CONVENTION OF THE NATIONAL LAWYER'S GUILD SAN FRANCISCO, CALIFORNIA, JULY, 1968

The National Lawyers Guild is a bar association, but one which faces squarely the need for radical change in the structure of our political and economic system. Recognizing the fact that the legal system under which we live is the creation of our society, we seek to change that society so that it will more adequately meet the needs of its people. The Guild must adopt a program which responds to this need and must devise forms of organization and activity which can effectively carry that program forward. Many activities which have become traditional in bar associations are frequently not sufficient in time of crisis and while they are still useful, they must be supplemented by new methods to meet new challenges.

Thus, legislative activity, the publication of articles for the profession and the laymen, exchange of information between lawyers, the holding of conferences and joint action with other bar associations are all valuable methods of work but they do not fully respond to the occasion nor do they exhaust our responsibilities as a bar association whose program addresses itself to a radical solution of the problems which are tearing our nation apart.

Other groups in our society – the black ghetto dwellers, the students, the dispossessed – are moving in ways which seem best to them to compel the restructuring of a society which is no longer acceptable to them. In this group, there are many law students and young lawyers who are deeply involved in this movement and whose continued involvement ought to be of great concern to us. If we are to make any contribution to this movement, it must be to use our professional skills to advance it. This, of course, means the development of our skills in the court room, but more than that, it means the utilization and development of our skills in the large arena of activity outside the court room – in the analysis of political and legal problems, in the development of legal doctrine to support radical activities and in the exercise of our professional skills wherever legal

issues may be relevant. Such activity may not only call for a new style of operation, but also requires a deep involvement by Guild lawyers in the political aspects of the problems we consider, and not merely in their legal aspects.

Form A (350-1-68) 94

9-

DEAD-LINE FOR SUBMISSION _____

Applicant's Office Telephone.....

Applicant's Home Telephone.....

ISSUED FEB 1 1968

SUBMITTED MAR 1 1968

53/54 Amended Complaint: Exhibit D

Appellate Division, Supreme Court
First Judicial Department
Committee on Character and Fitness
of
Applicants for Admission to the Bar

QUESTIONNAIRE AND STATEMENT OF APPLICANT

The Committee will not approve incomplete, defective, or carelessly prepared papers.

The answers to the following questions must be in BLACK INK. (Typewriter & Ball Point included)

Applicant must answer fully, truthfully and accurately ALL questions and inquiries and EACH subdivision thereof. Any omissions or inaccuracies may be deemed ground for disapproval and rejection of the application.

Ability to express full and responsive answers will be considered an element in the determination of fitness.

If the space for any answer is insufficient, the applicant may complete the answer on a rider, specifying the number of the question to which it relates.

Where YES or NO suffices, employ that form in answers.

All statements made on information and belief must be so designated and the sources of information must be given. Answers on information and belief will be accepted only in connection with matters which the applicant cannot be expected to know personally or remember because of youth or other reason.

1. Give the following information:

(a) .....
Name in full.

(b) .....
Was name ever changed or have you used any other name?

(c) .....
If name was changed or any other name used, give date, facts and reasons therefor. If changed by Court Order file copy of petition, certified copy of order and certificate of compliance.

(d) .....
Age date of birth place of birth

(e) .....
Present residence with whom living

(f) .....
Length of actual residence in the State of N. Y.

(g) .....
Are you married or single? If married, when, where and to whom?

(h) .....
Have you ever been divorced or separated? If so, give details and file copies of Pleadings, of Judgments and Agreements in any legal action in connection therewith.

(i) .....
Are you naturalized? If so, give the date when and place where. (Produce Certificate of Naturalization.)

2. State **exact address** of every residence you have had in the United States or elsewhere, and the **month and year** of the beginning and ending of each such residence.

Permanent Residences

Month and Year	Street and number	City or town	County or borough, and state

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Ability to express full and responsive answers will be considered an element in the determination of fitness.

If the space for any answer is insufficient, the applicant may complete the answer on a rider, specifying the number of the question to which it relates.

Where YES or NO suffices, employ that form in answers.

All statements made on information and belief must be so designated and the sources of information must be given. Answers on information and belief will be accepted only in connection with matters which the applicant cannot be expected to know personally or remember because of youth or other reason.

1. Give the following information:

(a) .....
Name in full.

(b) .....
Was name ever changed or have you used any other name?

(c) .....
If name was changed or any other name used, give date, facts and reasons therefor. If changed by Court Order file copy of petition, certified copy of order and certificate of compliance.

(d) .....
Age date of birth place of birth

(e) .....
Present residence with whom living

(f) .....
Length of actual residence in the State of N. Y.

(g) .....
Are you married or single? If married, when, where and to whom?

(h) .....
Have you ever been divorced or separated? If so, give details and file copies of Pleadings, of Judgments and Agreements in any legal action in connection therewith.

(i) .....
Are you naturalized? If so, give the date when and place where. (Produce Certificate of Naturalization.)

2. State **exact address** of every residence you have had in the United States or elsewhere, and the **month and year** of the beginning and ending of each such residence.

Permanent Residences

Month and Year	Street and number	City or town	County or borough, and state

Temporary Residences

3. Give the following information relating to your parents:

	Father	Mother
(a) Name in full.		
(b) Birth place.		
(c) Whether living or not.		
(d) Residence.		
(e)		

*Present or past occupation.

*"Merchant" or "Manufacturer" is not a sufficient answer as to occupation.

4. List **all schools** below college grade attended, giving **month and year** of the beginning and ending of attendance at each.

Name or designation of school	City, town or country	State	Month and year

Date of Graduation from High School.....

5. List **college or colleges** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason. State what sessions you attended, whether full or part time, day, evening, extension, or summer attendance.

Name or designation of college	City, town or country	State	Degree	Sessions	Month and year

6. If you did not receive a college degree before entering law school give date of filing Law Students Qualifying Certificate.....

7. List **law schools** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason. State what sessions you attended, whether full or part time, day, evening, extension, or summer attendance.

Name or designation of school	City, town or country	State	Degree	Sessions	Month and year

8. (A) Have you ever been denied admission to any school, college, law school, or other similar institution? .....If your answer be yes, state the facts.

.....

.....

(B) Have you ever been reprimanded, censured, suspended, dropped or otherwise disciplined by any school, college, law school or other similar institution for scholastic reason.....for misconduct..... If your answer is yes, attach rider giving a detailed statement of the facts and the disposition of the matter.

9. List chronologically all employments other than employments in law office, including part time and summer employments.

File letter from each employer giving nature of employment, period of service, whether satisfactory, and

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5. List **college or colleges** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason. State what sessions you attended, whether full or part time, day, evening, extension, or summer attendance.

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(B) Have you ever been reprimanded, censured, suspended, dropped or otherwise disciplined by any school, college, law school or other similar institution for scholastic reason.....for misconduct..... If your answer is yes, attach rider giving a detailed statement of the facts and the disposition of the matter.

9. List chronologically all employments other than employments in law office, including part time and summer employments.

File letter from each employer giving nature of employment, period of service, whether satisfactory, and reason for termination.

Name and address of employer	Dates of period of service	Position	Reason for termination

10. Have you ever been discharged by any employer?..... If so, state the cause and the circumstances.

.....

.....

11. Have you ever been engaged on your own account in any occupation, business, or profession?..... If so, give in detail the nature and location thereof and the **month and year** of the beginning and ending of your engagement in or connection therewith. If any such business was carried on by you in partnership with others, give the names and addresses of all partners and the nature of the business. If the business was carried on by a corporation in which you owned an interest list its name, address, natu :: of the business and your connection with it.

.....

.....

12. State all law offices with which you have been or are now connected, with address of each, nature of your connection and services, and the **month and year** of the beginning and ending thereof. Include the law department of any corporation.

.....

.....

13. How many times have you taken the New York State Bar examination? .....

14. Have you ever heretofore applied for admission to the bar of the State of New York in the First Judicial Department or any other Judicial Department?..... If so, state where, when, and with what result.

.....

.....

15. Have you ever taken the bar examination or applied for admission to practice as an attorney or counselor-at-law in any state other than the State of New York or in any other country?..... If so, give name of state or country and state specifically the result of the examination and the disposition made of the application. If granted, state whether you were admitted, giving the name of the court by which admitted, the date and place of such admission, the periods of practice and all the office addresses where you have practiced. (If admitted elsewhere file Certificate of Admission and of good standing of each Court including Federal Courts to which you have been separately admitted.)

.....

.....

16. (A) Have you ever been reprimanded, censured, disciplined, suspended, or disbarred as an attorney or counselor-at-law, or have any charges or complaints ever been preferred against you?..... If so, state the nature of the charges in full detail and the final disposition.....

(B) Has your conduct ever been called in question with reference to the unauthorized practice of law.....

(C) Have you ever been employed or otherwise connected with any person, firm, or corporation whose conduct was called in question on the subject of unauthorized practice of law while you were so employed or connected?.....

If your answer is yes as to any part of this question, state the matter fully.....

.....

.....

17. (A) State whether you have

(1) been a party to or otherwise included in any action or legal proceeding, either civil or criminal;.....

(2) testified or been called as a witness in any action or legal proceeding, either civil or criminal;.....

(3) been charged with crime, or arrested;.....

(4) been summoned for a violation of any law or corporate ordinance or traffic regulation;.....

(5) been requested to appear before any prosecuting officer or investigative agency or unit in any matter.....

If your answer be yes to any subdivision of this question, state the facts, and, if a party, the judgment or other disposition, naming the court and date in each case.

.....

.....

.....

(B) Have you ever asserted as a matter of right any claim or demand against any person, partnership or corporation?..... If so, give full details and disposition of the claim or demand.

.....

.....

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13. How many times have you taken the New York State Bar examination? .....

14. Have you ever heretofore applied for admission to the bar of the State of New York in the First Judicial Department or any other Judicial Department?..... If so, state where, when, and with what result.

15. Have you ever taken the bar examination or applied for admission to practice as an attorney or counselor-at-law in any state other than the State of New York or in any other country?..... If so, give name of state or country and state specifically the result of the examination and the disposition made of the application. If granted, state whether you were admitted, giving the name of the court by which admitted, the date and place of such admission, the periods of practice and all the office addresses where you have practiced. (If admitted elsewhere file Certificate of Admission and of good standing of each Court including Federal Courts to which you have been separately admitted.)

16. (A) Have you ever been reprimanded, censured, disciplined, suspended, or disbarred as an attorney or counselor-at-law, or have any charges or complaints ever been preferred against you?..... If so, state the nature of the charges in full detail and the final disposition.....

(B) Has your conduct ever been called in question with reference to the unauthorized practice of law.....

(C) Have you ever been employed or otherwise connected with any person, firm, or corporation whose conduct was called in question on the subject of unauthorized practice of law while you were so employed or connected?.....

If your answer is yes as to any part of this question, state the matter fully.....

17. (A) State whether you have

(1) been a party to or otherwise included in any action or legal proceeding, either civil or criminal;.....

(2) testified or been called as a witness in any action or legal proceeding, either civil or criminal;.....

(3) been charged with crime, or arrested;.....

(4) been summoned for a violation of any law or corporate ordinance or traffic regulation;.....

(5) been requested to appear before any prosecuting officer or investigative agency or unit in any matter.....

If your answer be yes to any subdivision of this question, state the facts, and, if a party, the judgment or other disposition, naming the court and date in each case.

(B) Have you ever asserted as a matter of right any claim or demand against any person, partnership or corporation?..... If so, give full details and disposition of the claim or demand.

(C) Has any claim or demand ever been asserted as a matter of right against you?..... If so, give full details and disposition of the claim or demand.

18. Are you indebted to anyone for money borrowed or advanced?..... Are there any judgments outstanding against you?..... (a) In either case give names of creditors, amounts, dates, nature of indebtedness and how payable; (b) If judgment obtained against you has been satisfied, attach certificate of satisfaction; (c) Are you in default in the discharge of any indebtedness?..... If so, give reason.

19. (A) Are there any favorable or unfavorable incidents in your life, whether at school, college, law school, business, or otherwise, not called for by the questions contained in this questionnaire or disclosed in your answers thereto?.....

If so, list them. .....

.....

.....

(B) If you engaged in extracurricular activities (athletic, dramatic, debating, fraternity, club, committee, administration, etc.) in college, indicate approximate amount of time spent and responsibility involved.

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20. Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?..... If so, state fully.

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21. (A) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member.

.....

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.....

(B) Have you ever been denied admission to or been disciplined, expelled or suspended from any club, association, society or organization or has your application for membership in any club, association, society or organization not been acted upon or withdrawn by you?.....

If your answer be yes, state the facts.

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.....

22. (A) Are you now or have you ever been a member of or affiliated in any way with any of the organizations or groups listed as subversive by the Attorney General of the United States?.....

(B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?.....

If your answer is yes to either subdivision of this question, give the following information:

Name and address of organization or group.....

.....

.....

When you became a member or affiliated with it. .....

.....

Period of your association or connection with it. .....

How and why you became associated or connected with it. .....

.....

.....

.....

How and why you severed your connection with it, if you did. .....

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23. Have you ever participated in any way whatsoever in the activities of such organizations or groups?.....

.....

If so, to what extent. .....

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society or organization of which you are or have been a member.

(B) Have you ever been denied admission to or been disciplined, expelled or suspended from any club, association, society or organization or has your application for membership in any club, association, society or organization not been acted upon or withdrawn by you?.....

If your answer be yes, state the facts.

22. (A) Are you now or have you ever been a member of or affiliated in any way with any of the organizations or groups listed as subversive by the Attorney General of the United States?.....

(B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?.....

If your answer is yes to either subdivision of this question, give the following information:

Name and address of organization or group.....

When you became a member or affiliated with it. .....

Period of your association or connection with it. .....

How and why you became associated or connected with it. .....

How and why you severed your connection with it, if you did. .....

23. Have you ever participated in any way whatsoever in the activities of such organizations or groups?.....

If so, to what extent. .....

24. (A) Do you believe in the principles underlying the form of government of the United States?..... State on a rider, in not less than 100 words, what you believe those principles to be. (Handwritten)

(B) Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to the Government of the United States?.....

25. Are you registered for Selective Service?..... If so, give Local Board No. and address

..... Classification..... Date.....

If requested, will you give written authorization for an examination of your Selective Service file?.....

26. Have you ever served on active duty in the Armed Forces of the United States?.....

Branch.....Dates of period of service.....Type of Discharge.....

Basis for Discharge.....

File photostat

27. Have you ever filed an application with the Federal, State or Municipal Civil Service Commissions for employment?.....

If so, state when and where and with whom application was filed, the position for which it was filed and the result. .....

.....

.....

28. (A) Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?.....

(B) Do you unconditionally subscribe to the same?.....

(C) Will you conscientiously endeavor to conform your professional conduct to them?.....

29. (A) Have you ever held a license the procurement of which required proof of good character?..... If so, as to each such license, state the date it was granted and the name and address of the authority granting it.

.....

.....

(B) If your application for such a license was not granted state the facts.

.....

.....

(C) Have you ever held a bonded position?..... If so, specify the nature of position, dates, amount of bond, and whether or not anyone ever sought to recover on your bond or cancelled the same?

.....

.....

(D) List every application presented or examination taken by you other than such as are herein elsewhere disclosed, for a position or license, the procurement of which required proof of good character. (Specify all examinations whether or not you were successful. Specify every application presented including applications for reinstatement and withdrawn applications and whether or not they were granted). State as to each application the date, the name and address of the authority to whom it was addressed and the disposition made of it, with the reasons therefor, and as to each examination, the result thereof.

.....

.....

30. (A) If admitted, do you intend to practice law?.....

(B) If you do not intend to practice law state why.

.....

.....

Signature of applicant.....

(Must conform to name on Certificate of State Board of Law Examiners)

STATE OF
COUNTY OF } ss.:

I, ..., being duly sworn, say: I have read the foregoing questions and have fully, truthfully and accurately answered the same. The foregoing answers are true of my own knowledge, except if stated to be made upon information and belief, and as to such answers, I believe them to be true.

Signature of applicant.....

(Sign as above)

Subscribed and sworn to before me this day of , 19 .

FORM 1. 6-25-67 1250 SETS (685-74)

Office Telephone .....

Home Telephone .....

COMMITTEES ON CHARACTER AND FITNESS

SECOND JUDICIAL DEPARTMENT

APPLICATION FOR ADMISSION TO THE BAR AND STATEMENT REQUIRED PURSUANT TO ARTICLE 9A OF THE CIVIL PRACTICE LAW AND RULES

DIRECTIONS

(Read all these directions carefully before attempting to answer any question.)

1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.

2. *Unless otherwise indicated, every question and every part of each question must be answered, even though the answer be negative.*

3. If the applicant cannot comply with any of the requirements, he must state in detail the efforts he has made to comply and why he cannot. Answers on information and belief will be accepted only in connection with matters which the applicant cannot be expected to remember because of extreme youth or other equally sufficient reason. All statements made on information and belief must be so designated in the *sworn statement, and the sources of information must be given.*

4. If the space left for any answer is insufficient, the applicant shall complete his answer on a sheet or sheets attached to this *sworn statement.* Avoid attaching sheets, however, whenever possible.

5. In stating addresses give street and number, if any, city, village or township, and state or country. If an address is in New York City, give the borough *in addition* to the city. *If present address of applicant be in a village, give also the township and county.*

6. In giving a period which is continuing at the date of verification of this sworn statement, always give such period as continuing "to date."

Answers must be in applicant's handwriting — not printing

To the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department:

The undersigned hereby applies for admission to practise as an attorney and counselor-at-law in all courts of the State of New York, and in support of such application submits the following sworn statement and the accompanying affidavits and other papers:

1. (a) State full name ..... (First) (Middle) (Last)

(b) Have you ever used or been known by any other name? ..... If so, state in full each name (other than the name above given) which you have used or by which you have at any time been known, and the reasons for each such name.

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PURSUANT TO ARTICLE 94 OF THE CIVIL PRACTICE LAW AND RULES

DIRECTIONS

(Read all these directions carefully before attempting to answer any question.)

1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.

2. *Unless otherwise indicated, every question and every part of each question must be answered, even though the answer be negative.*

3. If the applicant cannot comply with any of the requirements, he must state in detail the efforts he has made to comply and why he cannot. Answers on information and belief will be accepted only in connection with matters which the applicant cannot be expected to remember because of extreme youth or other equally sufficient reason. All statements made on information and belief must be so designated in the *sworn statement, and the sources of information must be given.*

4. If the space left for any answer is insufficient, the applicant shall complete his answer on a sheet or sheets attached to this *sworn statement.* Avoid attaching sheets, however, whenever possible.

5. In stating addresses give street and number, if any, city, village or township, and state or country. If an address is in New York City, give the borough *in addition* to the city. *If present address of applicant be in a village, give also the township and county.*

6. In giving a period which is continuing at the date of verification of this sworn statement, always give such period as continuing "to date."

Answers must be in applicant's handwriting — not printing

To the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department:

The undersigned hereby applies for admission to practise as an attorney and counselor-at-law in all courts of the State of New York, and in support of such application submits the following sworn statement and the accompanying affidavits and other papers:

1. (a) State full name ..... (First) (Middle) (Last)

(b) Have you ever used or been known by any other name? ..... If so, state in full each name (other than the name above given) which you have used or by which you have at any time been known, and the reasons for each such name.

(c) If your name has ever been changed, state former name and when, how and why, change was made. If change was made by court order annex a certified copy thereof, and certificate of compliance therewith.

2. State age in years as of last preceding birthday.

3. (a) State residence (giving all details specified in paragraph 5 of above directions).

   (b) Mailing address (including zip code number).

4. State date and place of birth (giving date and borough, if any, city or town and state or country).

5. (a) State whether you are married or single.

   (b) If you are married, give the date of marriage and full name of spouse and any other name by which said spouse has been known.

   (c) If you are married, do you live with your husband or wife? If you are not living with your husband or wife, give reasons for living apart.

   (d) Except as above stated, have you ever been married? If your answer be "yes" when, where and with whom was each such marriage contracted and when, how and why was the marital status terminated?

   (e) State present name and address of former spouse.

6. Name and identify the persons with whom you reside, (permanently and/or temporarily) enumerating all members of family, or if not residing with family, then of household.

4. State date and place of birth (giving date and borough, if any, city or town and state or country).

5. (a) State whether you are married or single.

(b) If you are married, give the date of marriage and full name of spouse and any other name by which said spouse has been known.

(c) If you are married, do you live with your husband or wife? If you are not living with your husband or wife, give reasons for living apart.

(d) Except as above stated, have you ever been married? If your answer be "yes" when, where and with whom was each such marriage contracted and when, how and why was the marital status terminated?

(e) State present name and address of former spouse.

6. Name and identify the persons with whom you reside, (permanently and/or temporarily) enumerating all members of family, or if not residing with family, then of household.

7. Are you a citizen of the United States of America? By birth? By naturalization?

If you became a citizen by naturalization, give date and place of naturalization, with petition and certificate numbers, and submit original naturalization certificate, which will eventually be returned to you. If there is a variance between the name appearing on your birth certificate or certificate of naturalization and the name used in this application, explain the reason for the variance.

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8. State every residence you have ever had, in the United States or elsewhere, with exact address of each, and the month and year of the beginning and ending of each such residence.

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county (If in New York City, also give Borough)	State or Country
	Permanent Residences (List same chronologically. *Temporary residences*, which are residences *away from home* for educational, business or other special purposes, are to be listed on next page. *Do not interrupt the continuity of the periods of permanent residence by subtracting periods of temporary residence.*)		
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(Continue permanent residences if necessary, and give temporary residences on next page.)

(Permanent Residences Continued)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county (If in New York City, also give Borough)	State or Country
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Temporary Residences

(These include only residences *away from home* for educational, business or other special purposes. Do not interrupt continuity of periods of permanent residence, to be given above, *by subtracting periods* of temporary residence.)

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9. State facts indicated below regarding each parent and any step-parent or foster parent.

Full names including Mother's Maiden Name	Residence (or in case of decease last residence).	Place of Birth	Occupation (or most recent occupation).	Living? (If deceased give date.)

10. State *all* elementary and high schools ever attended.

Name or Designation	City or Town (If in New York City, also give Borough.)	State or Country	Month and Year of Beginning and Ending of Period or Periods of Attendance, indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance

11. State *all* colleges and professional schools (other than law schools) ever attended. *If you did not receive a degree from any such institution, state that fact and give the reason in the additional space below.*

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

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10. State *all* elementary and high schools ever attended.

Name or Designation	City or Town (If in New York City, also give Borough.)	State or Country	Month and Year of Beginning and Ending of Period or Periods of Attendance, indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance

11. State *all* colleges and professional schools (other than law schools) ever attended. *If you did not receive a degree from any such institution, state that fact and give the reason in the additional space below.*

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

12. State *all* law schools ever attended. *If you did not receive a degree from any law school, state that fact and give the reason in the additional space below.*

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

13. State if you ever attended any other schools of any kind or pursued any course of studies, in addition to those hereinabove mentioned.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

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13. State if you ever attended any other schools of any kind or pursued any course of studies, in addition to those hereinabove mentioned.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

14. Have you ever been placed on probation, or dropped, or suspended or expelled from, or have you withdrawn from or left any institution of learning, *or otherwise been subjected to discipline, by any such institution,* or requested or advised for any reason to discontinue your studies therein temporarily or otherwise?

If your answer be yes, give the name of any such institution and state the cause, circumstances and date of each such occurrence.

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15. At the time of World War II were you within the ages covered by the Selective Service law then in force? If so, give the following information:

(a) State original classification and each reclassification, if any.

(b) Set forth branch, nature and dates of active service in the armed forces, if any.

(c) Give reason for each discharge or release, and submit photostat copy of each discharge or release.

16. (a) Have you registered under the U. S. Selective Service Act of 1948? If you have registered, give the location and number of the local draft board.

(b) State your original classification and each reclassification, if any.

(c) If your classification or reclassification is other than 1A, give the reason therefor.

(d) Since the passage of the 1948 Act have you been inducted into, or have you enlisted or been commissioned in, any of the armed services of the United States? If the answer shall be "Inducted," "Enlisted" or "Commissioned," specify the service. Give dates of induction, enlistment, commission and active duty.

(e) If you have been inducted or have enlisted or been commissioned, have you been honorably discharged or released? If your answer be "Yes," give date and reason, stating facts fully, and submit a photostat copy of each discharge or release certificate.

17. Have you ever been rejected for service in or discharged or released from for reasons other than honorable by any of the armed services of the United States or of any other country? If your answer be "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photostat copy of any documentary proof thereof.

18. Have you at any time or in any manner, except as set forth under questions 15, 16 and 17 applied to be admitted into any of the armed services of the United States, including reserves? If the answer be "Yes," state (a) when, where, which service and with what result; (b) period and nature of service rendered; (c) if discharged give date and nature of discharge and submit photostat copy of discharge certificate; (d) if rejected give reason stating facts fully, and submit photostat copy of documentary proof, if any.

(a)

(b)

(c)

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(c) Give reason for each discharge or release, and submit photostat copy of each discharge or release.

16. (a) Have you registered under the U. S. Selective Service Act of 1948?
If you have registered, give the location and number of the local draft board.

(b) State your original classification and each reclassification, if any.

(c) If your classification or reclassification is other than 1A, give the reason therefor.

(d) Since the passage of the 1948 Act have you been inducted into, or have you enlisted or been commissioned in, any of the armed services of the United States?
If the answer shall be "Inducted," "Enlisted" or "Commissioned," specify the service. Give dates of induction, enlistment, commission and active duty.

(e) If you have been inducted or have enlisted or been commissioned, have you been honorably discharged or released? If your answer be "Yes," give date and reason, stating facts fully, and submit a photostat copy of each discharge or release certificate.

17. Have you ever been rejected for service in or discharged or released from for reasons other than honorable by any of the armed services of the United States or of any other country? If your answer be "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photostat copy of any documentary proof thereof.

18. Have you at any time or in any manner, except as set forth under questions 15, 16 and 17 applied to be admitted into any of the armed services of the United States, including reserves? If the answer be "Yes," state (a) when, where, which service and with what result; (b) period and nature of service rendered; (c) if discharged give date and nature of discharge and submit photostat copy of discharge certificate; (d) if rejected give reason stating facts fully, and submit photostat copy of documentary proof, if any.

(a)

(b)

(c)

(d)

19. Have you served in the armed forces (reserves or otherwise) of any country other than the United States of America? If the answer is yes, give name of country, inclusive dates of service, and reason for separation from service. (Submit photostat of discharge or release.)

20. Have you ever been engaged on your own account alone or with others in any business or profession or any other occupation whatsoever? If so, state under what name and give in detail the nature thereof, the month and year of the beginning and ending of your connection therewith, and all business or professional addresses. Any such business or profession carried on by you alone or with others, or in partnership and any incorporated business carried on by you either alone or with others, should be here listed, with names and addresses of all partners or associates. If any business or profession has been discontinued, or if your connection therewith has ceased, state why, and whether or not there are unpaid debts or claims or pending litigation. Give hours of beginning and ending of daily period devoted by you to each business, profession or occupation. The answer to this question need not give information required under question 27.

21. Have you ever been employed in or associated with any law office, law department or legal institution? If so, enumerate *all* such employments and associations in chronological order. Include employments by members of family or other relatives and employments without monetary compensation.

Month and Year of Beginning and Ending of Period of Employment	Hours of Beginning and Ending	Name of Employer (Individual, partnership or corporation. Do not give name of an agent of employer.)	Address of Employer (Give street, number, city or town and state or country.)	Nature of Employer's Business	Position or Positions held by Applicant	Reason for Termination

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21. Have you ever been employed in or associated with any law office, law department or legal institution? If so, enumerate *all* such employments and associations in chronological order. Include employments by members of family or other relatives and employments without monetary compensation.

Month and Year of Beginning and Ending of Period of Employment	Hours of Beginning and Ending of Daily Period	Name of Employer (Individual, partnership or corporation. Do not give name of an agent of employer.)	Address of Employer (Give street, number, city or town and state or country.)	Nature of Employer's Business	Position or Positions held by Applicant	Reason for Termination

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22. Have you ever been employed in any business or profession or any other occupation whatsoever, other than the law? If so, enumerate *all* such employments in chronological order. Include employments by members of family or other relatives and employments without monetary compensation.

Month and Year of Beginning and Ending of Period of Employment	Hours of Beginning and Ending of Daily Period	Name of Employer (Individual, partnership or corporation. Do not give name of an agent of employer.)	Address of Employer (Give street, number, city or town and state or country.)	Nature of Employer's Business	Position or Positions held by Applicant	Reason for Termination
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Amended Complaint: Exhibit E 67/68

23. (a) Give each period during which you have been unemployed or without occupation since you were sixteen years old, including summer vacations from school, college or law school, with reason for being unemployed or without occupation during each such period.

(b) Explain any overlapping of periods appearing from answers to questions 10, 11, 12, 13, 20, 21 and 22, *supra*, either severally or in connection with other answers.

24. Have you ever been discharged, or has your service ever been terminated, by any employer?
If so, give the name of each such employer and attach your affidavit stating date, cause and circumstances in detail.

25. Do you affirmatively represent that, in connection with all your employments for which no proof has been supplied, your services were satisfactory and that you were not discharged nor were your services terminated for cause, nor were you requested or advised to resign from or leave any such position?

If answer is no, give full details as to each such incident.

26. Have you ever applied for admission to the Bar of the State of New York?
If so, where, when, and with what result?

27. (a) Have you ever registered as a law student, or applied to take or taken the bar examination in any country, state or jurisdiction other than the State of New York?
If so, state when, where, and with what result.

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ployer?
If so, give the name of each such employer and attach your affidavit stating date, cause and circumstances in detail.

25. Do you affirmatively represent that, in connection with all your employments for which no proof has been supplied, your services were satisfactory and that you were not discharged nor were your services terminated for cause, nor were you requested or advised to resign from or leave any such position?

If answer is no, give full details as to each such incident.

26. Have you ever applied for admission to the Bar of the State of New York?
If so, where, when, and with what result?

27. (a) Have you ever registered as a law student, or applied to take or taken the bar examination in any country, state or jurisdiction other than the State of New York?
If so, state when, where, and with what result.

(b) Have you applied for admission to practise as an attorney or counselor in any country, state or jurisdiction other than the State of New York? If so, state specifically the disposition made of the application; if admitted, give the name and address of each court by which admitted, the date of such admission, the periods of practise and all the office addresses where you have practised, with the names and addresses of partners, if any. (Applicants admitted in other jurisdictions must submit proof from each Grievance Committee, or body entertaining complaints against lawyers, in each County or District in which the applicant has practiced, certifying as to whether charges have been filed with such Committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof. Instruction Sheet D may be obtained from Committee Office.)

(c) Have any charges ever been preferred against you as an attorney or counselor-at-law? If so, attach your affidavit stating in detail the circumstances.

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28. State whether you have ever

(Answer each subdivision of this question "Yes" or "No.")

(a) testified or been called as a witness in any action, proceeding or investigation to which you were not a party;

(b) been ticketed, or summoned, or arrested, or taken into custody, or indicted, or convicted, or tried for, or charged with, or pleaded guilty to the violation of any law, ordinance, traffic or parking regulation or the commission of any felony, or misdemeanor, or been requested to appear before any prosecuting or investigative agency in any matter?
(Indicate all such incidents, including proceedings as a juvenile offender, no matter how minor the infraction or whether guilty or not. Although a conviction may have been expunged from the records by order of court, it nevertheless must be disclosed in the answer to this question.)

(c) failed to answer on the return date any ticket, summons or other legal process served upon you at any time? If so, was any warrant, subpoena, or further process issued against you as a result of your failure to respond to such legal process?

(d) as a member of any armed forces, been the subject of any charges or complaints, formal or informal, or have any proceedings been instituted against you, or have you been a defendant in any courts martial or been disciplined?

(e) been declared a ward of any court, or adjudged an incompetent, or have any proceedings been brought to have you declared a ward of any court or adjudged an incompetent, or have you been committed to any institution or been a patient in any institution for the care of persons suffering from mental or nervous disorders or drug addiction or alcoholism?

(f) been charged with fraud or any other matter involving moral turpitude?

(g) been a party to or otherwise involved in any action or proceeding, or investigation either civil or criminal, not covered by answers to the foregoing subdivisions of this question?

If your answer be YES to any subdivision of this question, state the facts in detail and give in each case name and locality of court or agency, dates of beginning and termination of action or proceeding, and the judgment or other disposition below.

29. (a) Are there any unsatisfied judgments against you? If so, list the same giving name and address of judgment creditor and the court by which judgment was rendered, together with the date and amount thereof and the nature of the claim on which it was based.

(b) Are you in default in the performance or discharge of any duty or obligation imposed upon you by any governmental agency or decree or order of any court including alimony and support orders and decrees?
If so, state the facts.

(c) Are you indebted to anyone? If so, list all debts stating name and address of creditor and amount, date, nature and status of indebtedness.

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(b) Are you in default in the performance or discharge of any duty or obligation imposed upon you by any governmental agency or decree or order of any court including alimony and support orders and decrees?
If so, state the facts.

(c) Are you indebted to anyone? If so, list all debts stating name and address of creditor and amount, date, nature and status of indebtedness.

(d) Has any one ever asserted a claim or demand against you, which has not been made the subject of any action or legal proceeding? If so, state the facts and the present status of the matter.

(e) Have you ever asserted any claim or demand against any person, partnership or corporation, or governmental agency which has not been made the subject of any action or legal proceeding?
If so, state the facts and the present status of the matter.

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30. Have you ever

(An applicant for admission on motion is to construe this question as not covering activities in any jurisdiction in which he has been admitted to practise law.)

(a) tried any action or proceeding?

(b) argued any motion?

(c) drawn legal papers or given legal advice?

(This does not apply to the drawing of papers for, or reporting on questions of law to, an attorney under whose supervision applicant has served as a law clerk.)

(d) held yourself out to be an attorney or counselor-at-law?

If the answer to any of the above questions be yes, state the facts.

31. (a) Have you submitted with this application for admission to the Bar a character affidavit from each person to whom you referred in any application to enter any law school, or whose recommendation was submitted to any law school which you attended? If not, state fully your reasons therefor.

(b) Has any of such persons any information detrimental to your character or fitness? If yes, state the facts.

32. Have you written any articles for publication? If so, give the circumstances, the name of publication, the date of publication and the title and subject matter of the article. (Include information relative to any articles for publication in any school or college paper or magazine.)

33. Do you believe in the principles underlying the form of government of the United States? Briefly state the reasons for your answer.

34. Do you conscientiously affirm (without any mental reservation) that you are loyal to the Government of the United States of America?

35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

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34. Do you conscientiously affirm (without any mental reservation) that you are loyal to the Government of the United States of America?

35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

(b) Are you now or have you ever been a member of any party or organization created for such purpose or for the propagandizing or the furtherance thereof?

(c) If answer is yes, state the name of the party or organization.

(d) Are you now, or have you ever been, a member of the Communist Party, or have you ever been enrolled as a member of the Communist Party?

THIS SPACE RESERVED FOR BINDING

36. (a) Are you now, or have you ever been at any time (including the time during which you attended high school, college and law school, and including the time during which you engaged in military service or any community activity) a member of any club, association, society or organization or political party?

(b) If answer be yes, give the name, address and objects of each and every such club, association, society or organization or party and state the period of your membership and your position or title therein.

15

37. Is there *any* incident in your life not called for by the foregoing questions which has any detrimental bearing on your character or fitness? If the answer be yes, state the facts.

38. (a) Have you read the Canons of Ethics adopted by the American Bar Association and the New York State Bar Association?

(b) Do you unconditionally subscribe to the same?

(c) Will you conscientiously endeavor to conform your professional conduct to them?

I understand that this application is a *continuing application* and must give correctly the information herein sought as of the date of my appearance before the Appellate Division to be sworn in as an attorney and counselor-at-law. I will, therefore, before such appearance, notify the Secretary to the Committees as to any change

(a) In my residence;

(b) In my employment;

(c) In respect of any other matter regarding which information is herein sought.

In case of any such change I will file such further affidavits or papers as may be required.

Signature of Applicant .....

STATE OF NEW YORK
COUNTY OF
(Insert name of County)
} ss.:

I, ..., being duly sworn, say: I have read the foregoing questions and have completely and frankly answered the same in my handwriting. The foregoing answers are true of my own knowledge, except where stated to be made upon information and belief, and as to such answers, I believe them to be true.

Signature of Applicant .....

Sworn to before me this day of

19

Form F (700-1-68) 94

Appellate Division, Supreme Court
First Judicial Department
Committee on Character and Fitness
of
Applicants for Admission to the Bar

INSTRUCTIONS FOR PERSONS FURNISHING SPONSORING AFFIDAVITS

ATTORNEYS AND OTHERS WHO MAKE AFFIDAVITS IN SUPPORT OF APPLICATIONS FOR ADMISSION TO THE BAR WILL GREATLY FACILITATE THE WORK OF THE COMMITTEE AND THEREBY EXPEDITE ACTION UPON SUCH APPLICATIONS BY COMPLYING STRICTLY WITH THE FOLLOWING REQUIREMENTS IN THE ORDER GIVEN BELOW.

Points to be covered in drawing affidavits of character

1. Proper heading. (See back hereof for Form.)
2. Name of affiant.
3. Residence address of affiant.
4. Nature of affiant's business. (If affiant be a practicing attorney, he should state that he is a practicing attorney of the Supreme Court of the State of New York and give the year of his admission to the Bar and the Judicial Department in which he was admitted; and if known to a Committee member the name of the member to whom he is known.)
5. Business address of affiant.
6. Length and nature of affiant's acquaintance with applicant.
7. Affidavits must state *that to the knowledge (or in the opinion) of the affiant the applicant is a person of good moral character.*
8. Set forth in detail the facts upon which affiant's knowledge of or opinion as to applicant's moral character is based. If, for example, applicant has been employed by affiant or under his supervision, the period of employment with the month and year of the beginning and ending thereof, the nature of the position or positions held, services rendered by applicant and the reason for leaving employment must be stated and what, if any, personal contact affiant has had with applicant. If the acquaintance between affiant and applicant is of a social nature, the facts of social contact must be stated, as, for example, that affiant has been a visitor in the applicant's home and is acquainted with his parents or other members of his family, or that affiant has been associated with applicant and nature and extent of such association. Affidavits covering home life should characterize family and home environment.
9. Affiant must have read the VERIFIED original questionnaire and answers of applicant (and riders, if any) and state such fact and that to the best of his knowledge and belief the several answers of applicant are truthful and accurate. Affiant also must state verification date as it appears on the questionnaire.

The foregoing instructions are intended to supplement the instruction sheet, and are to be given by applicants to those persons of whom they request affidavits. Additional copies, if needed, may be had upon application at the Committee's office, 51 Madison Avenue, New York City.

LOWELL WADMOND, *Chairman*—14 Wall Street
FELIX A. MULDOON, *Vice-Chairman*—111 Broadway
EDWIN L. WEISL—120 Broadway
MARK F. HUGHES—1 Chase Manhattan Plaza
BRUCE BROMLEY—1 Chase Manhattan Plaza
MONROE GOLDWATER—60 East 42 Street
ARTHUR H. SCHWARTZ—19 East 70 Street
[illegible] 535 Fifth Avenue

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INSTRUCTIONS FOR PERSONS FURNISHING SPONSORING AFFIDAVITS

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2. Name of affiant.
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5. Business address of affiant.
6. Length and nature of affiant's acquaintance with applicant.
7. Affidavits must state *that to the knowledge (or in the opinion) of the affiant the applicant is a person of good moral character.*
8. Set forth in detail the facts upon which affiant's knowledge of or opinion as to applicant's moral character is based. If, for example, applicant has been employed by affiant or under his supervision, the period of employment with the month and year of the beginning and ending thereof, the nature of the position or positions held, services rendered by applicant and the reason for leaving employment must be stated and what, if any, personal contact affiant has had with applicant. If the acquaintance between affiant and applicant is of a social nature, the facts of social contact must be stated, as, for example, that affiant has been a visitor in the applicant's home and is acquainted with his parents or other members of his family, or that affiant has been associated with applicant and nature and extent of such association. Affidavits covering home life should characterize family and home environment.
9. Affiant must have read the VERIFIED original questionnaire and answers of applicant (and riders, if any) and state such fact and that to the best of his knowledge and belief the several answers of applicant are truthful and accurate. Affiant also must state verification date as it appears on the questionnaire.

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ARTHUR H. SCHWARTZ—19 East 70 Street
BERNARD TRENCHER—535 Fifth Avenue
THOMAS B. DYETT—401 Broadway
ALFRED A. GIARDINO—21 West Street

COMMITTEE ON CHARACTER AND FITNESS, FIRST JUDICIAL DEPARTMENT
Office of Committee, 51 Madison Avenue, New York, N. Y. 10010
THEODORE R. FRESCHI, *Secretary*
Telephone 683 { 7746 / 7747 }

(SAMPLE ONLY)

(not to be submitted)

Supreme Court of the State of New York

APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application

of

.....

For Admission to the Bar

STATE OF
COUNTY OF } ss.:

.....being duly sworn deposes and says;

(BODY OF AFFIDAVIT)

.....
(Signature)

Sworn to before me this.....

day of ....., 19.....

(DO NOT FORGET TO HAVE ALL AFFIDAVITS NOTARIZED)

(NOTE: No back shall be put on Affidavits)

NEW YORK SUPREME COURT, APPELLATE DIVISION.
SECOND DEPARTMENT

Form for Affidavit of Character and Home Life

IN THE MATTER OF THE APPLICATION

of

(Insert name of applicant)

for Admission to Practise as an Attorney and Counsellor-at-Law.

NOTICE

All persons who make affidavits on this form are requested to read all the questions before answering any of them, so that the several answers may be responsive to the questions respectively.

The answers to all questions are to be written, preferably in typewriting, by or under the direction of the affiant.

It is desired that both the subject matter and the language of each answer shall be supplied by the affiant and not by the applicant.

Nothing not personally known to affiant should be stated.

STATE OF
} ss.:
COUNTY OF

, the affiant, being duly sworn, deposes

(Name of Affiant)

and says that the answers to the following questions have been written by or under the direction of affiant, and that both questions and answers have been carefully read by affiant and that the several answers are true of affiant's own knowledge, except those stated to have been made on information and belief, and those stated to give the opinion or belief of affiant, and as to those answers, affiant believes them to be true.

1. Name of affiant?

2. Residence address? (Give full address, including street and number, borough, if any, and city, or village and/or township, as circumstances may require, and county, state and country.)

3. Nature of business? (If a lawyer, state whether or not you are a *practising attorney* of the Supreme Court of the State of New York, and/or an attorney of any court or courts in any other state, country or jurisdiction, specifying each such state, country or jurisdiction, and give place of admission to the Bar, and approximate date of such admission.)

4. Business address?

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Exhibit G

IN THE MATTER OF THE APPLICATION

of

(Insert name of applicant)

for Admission to Practise as an Attorney and Counsellor-at-Law.

All persons who make affidavits on this form are requested to read all the questions before answering any of them, so that the several answers may be responsive to the questions respectively.

The answers to all questions are to be written, preferably in typewriting, by or under the direction of the affiant.

It is desired that both the subject matter and the language of each answer shall be supplied by the affiant and not by the applicant.

Nothing not personally known to affiant should be stated.

STATE OF
} ss.:
COUNTY OF

, the affiant, being duly sworn, deposes
(Name of Affiant)

and says that the answers to the following questions have been written by or under the direction of affiant, and that both questions and answers have been carefully read by affiant and that the several answers are true of affiant's own knowledge, except those stated to have been made on information and belief, and those stated to give the opinion or belief of affiant, and as to those answers, affiant believes them to be true.

1. Name of affiant?

2. Residence address? (Give full address, including street and number, borough, if any, and city, or village and/or township, as circumstances may require, and county, state and country.)

3. Nature of business? (If a lawyer, state whether or not you are a *practising attorney* of the Supreme Court of the State of New York, and/or an attorney of any court or courts in any other state, country or jurisdiction, specifying each such state, country or jurisdiction, and give place of admission to the Bar, and approximate date of such admission.)

4. Business address?

5. How long have you known the applicant personally?

6. Are you related to applicant by blood or marriage, or is there any business, professional or similar relationship between you and the applicant or his family?

7. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the *particular activities* should be specified.

8. How often during each week, month or year, or other division of time, have you come in contact with applicant during the entire period of acquaintance or designated parts thereof? ("Frequently" or "often" or other indefinite statement is not a satisfactory answer.)

9. What is your conclusion as to applicant's *moral* character? (Reserve details for next question.)

10. Set forth in **detail** what you have *personally observed* in your associations with applicant which leads you to the conclusion set forth under question 9, specifying, among other things, the **moral** qualities and personal traits observed in applicant's conduct, and his usual attitude toward those with whom he associates.

11. Have you visited applicant's
    (a) parental home;
    (b) marital home, if any;
    (c) any other home or place of abode applicant may have had?

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8. How often during each week, month or year, or other division of time, have you come in contact with applicant during the entire period of acquaintance or designated parts thereof? ("Frequently" or "often" or other indefinite statement is not a satisfactory answer.)

9. What is your conclusion as to applicant's *moral* character? (Reserve details for next question.)

10. Set forth in **detail** what you have *personally observed* in your associations with applicant which leads you to the conclusion set forth under question 9, specifying, among other things, the **moral** qualities and personal traits observed in applicant's conduct, and his usual attitude toward those with whom he associates.

11. Have you visited applicant's
    (a) parental home;
    (b) marital home, if any;
    (c) any other home or place of abode applicant may have had?

(Answer "Yes" or "No" to each subdivision.)

(If affiant's answer to each subdivision of the foregoing question be "No," questions 12 to 16, inclusive, should not be answered. If the answer be "Yes," to any subdivision, then questions 12 to 16, inclusive, should be answered, giving the details required by each question with respect to the home or homes with which affiant is familiar.)

12. (a) How often, approximately, during each week, month or year, have you visited the parental, marital or other home or place of abode of applicant?

("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 8, above.)

(b) During what years (stating approximate dates)?

(c) At what addresses (listing them specifically)?

(d) Do such visits still continue? If not, when did they cease, and for what reason?

DO NOT WRITE IN THIS SPACE

DO NOT WRITE IN THIS SPACE

13. Have you on such visits met and conversed with:

(a) Applicant;

(b) The members of his family or household? If not with all, with which members?

14. (a) With what persons has the applicant lived during each period of your association with him in his home? (If during period or periods covered by answer, applicant has lived with family, enumerate the members of the family during each period. If, during any period of association, he has lived apart from his family, enumerate the persons, if any, with whom he has lived during each such period.)

(b) With what persons does he live at the present time, if that be known to you?

15. Set forth in **detail** what you have *personally observed* as to the **moral** qualities and conduct of the members of applicant's **family** or other persons with whom he has lived:

(a) in parental home;

(b) in marital home, if any;

(c) in any other home or place of abode applicant may have had.

16. What do you say of applicant's conduct toward the members of his family or household during each period of your association with him in his home, and at present, if association still continues?
(Give full details.)

17. State fully any other facts within your knowledge, or of which you have information, which in your opinion have any bearing on the applicant's moral character or fitness to practise law, or which would be helpful to the Committee in determining the applicant's character and fitness.

(Insert date) Sworn to before me this

day of 19

.....
(Affiant to sign here)

.....
(Attesting officer to sign here)

.....
(Official designation)

(If affidavit is sworn to outside the State of New York, attach clerk's certificate)

Notice of Motion for Three-Judge Court

UNITED STATES DISTRICT COURT
Southern District of New York
[68 Civ. 2917]

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,

Plaintiffs,

—against—

LOWELL WADMOND, *et al.*,

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

PLEASE TAKE NOTICE, that the undersigned will move this Court at a Motion Term thereof to be held on July , 1968 at 10:00 A.M. in Room 506 of the United States Courthouse, Foley Square, New York, New York for an order convening a three judge District Court to hear and determine this proceeding.

New York, New York
July , 1968

JEREMIAH S. GUTMAN
363 Seventh Avenue
New York, New York 10001
Telephone: 244 6670

ALAN H. LEVINE
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
Telephone: WA 9 6076

Motion for Three-Judge Court

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917]

The plaintiffs by their undersigned attorneys move that a three judge court be convened to hear and determine this action pursuant to 28 U.S.C. § § 2281 and 2284.

JEREMIAH S. GUTMAN
363 Seventh Avenue
New York, N. Y. 10001
Telephone: 244 6670

ALAN H. LEVINE
c/o New York Civil Liberties Union
156 Fifth Avenue
New York, N.Y. 10010
Telephone: WA 9 6076

Motion for Preliminary and Permanent Injunction

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917]

Upon the annexed complaint and motion in the above-entitled action and the annexed complaint and motion in *Stephen Martin Wexler, et al. vs. The Supreme Court of the State of New York,* Index No. 68 Civ 2938, for the convening of a three judge court and for the issuance of a declaratory judgment and preliminary and permanent injunction, and upon the affidavit of ALAN H. LEVINE, one of the attorneys for the plaintiffs in the above-entitled action, it appearing that both of the actions involve common questions of law and fact within the meaning of Rule 42(a) of the Federal Rules of Civil Procedure, it is

ORDERED, that the defendants show cause at Room , United States Courthouse, Foley Square, New York, New York on the day of August, 1968 at m. in the noon of that day or as soon thereafter as counsel can be heard why an order should not be made consolidating the above-entitled actions, and it is further

ORDERED, that personal service of a copy of this Order and of the papers upon which the same is granted on the Honorable Louis J. Lefkowitz, the attorney for the defendants in both of the above-entitled actions on or before August 23, 1968 shall be sufficient service of this ORDER.

Dated: New York, N. Y.
August , 1968

United States District Judge

Affidavit of Alan H. Levine in Support of Motion for Preliminary and Permanent Injunction

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917]

ALAN H. LEVINE, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs in the above-entitled action and respectfully submit this affidavit in support of an order to show cause for consolidation of the complaints and motions in the above-entitled action with those in *Wexler, et al. vs. The Supreme Court, et al.* which are presently pending before this Court.

2. This application is made pursuant to Rule 42(a), F.R.C.P., upon the ground that both actions involve common issues of law and fact, and that a joint hearing upon the motions and complaints in question will avoid unnecessary loss of time and needless cost and delay.

3. Both of these actions seek a declaration that under the Constitution of the United States, and in particular the First, Fifth, Sixth, Ninth and Fourteenth Amendments thereto, the statutory scheme described in the annexed complaints for admission to the Bar in the First Judicial Department of the Appellate Division of the New York Supreme Court is unconstitutional on its face and as applied. Both actions also seek to enjoin the defendants from violating the plaintiffs' constitutional rights through the unlawful administration of this scheme.

4. An examination of the complaints in these actions clearly shows that the issues of law and fact in both cases are similar if not identical. Further, inasmuch as similar relief is

prayed for in both complaints, inconsistent disposition of the two actions would be contrary to sound judicial administration.

5. It is respectfully submitted, therefore, that the issues of law and fact in these two actions are substantially the same and that it would be in the interest of economy, expedition and substantial justice to have the respective motions for a three judge court and complaints consolidated for hearing.

6. The reason that this motion is being brought on by order to show cause is that there is insufficient time to seek the relief prayed for herein by notice of motion.

7. No prior application for the relief prayed for herein has been made.

Sworn to before me this
23rd day of August, 1968

/s/ Alan H. Levine

**Motion for Three-Judge Court,
Preliminary Injunction, and Summary Judgment**

UNITED STATES DISTRICT COURT
Southern District of New York

[68 Civ. 2938]

STEPHEN MARTIN WEXLER, *et al.*,

Plaintiffs,

—against—

THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, First Judicial Department, *et al.*,

Defendants.

PLEASE TAKE NOTICE that upon the complaint herein, the affidavit of Jonathan Lubell, sworn to the 9th day of August, 1968, and the annexed statement pursuant to Rule 9(g) of the General Rules of this Court, the undersigned will move this Court at a Motion Part thereof, to be held in Room 506, United States Courthouse, Foley Square, New York, New York, on the 20th day of August, 1968 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for (i) an order convening a three-judge court in conformity with 28 U.S.C. §§ 2281 and 2284, (ii) an order granting plaintiffs summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law, (iii) an order granting plaintiffs a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, and (iv) an order directing the defendants to appear for oral examination with respect to the issues in this case, pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, and directing the defendants, pursuant to Rule 34 of

the Federal Rules of Civil Procedure, to produce and permit the inspection and copying of all relevant rules, regulations, instructions, policy statements, reports, questionnaires, transcripts of hearings and investigations and summaries thereof, relating to the admission of attorneys, pursuant to Judiciary Law, Section 90 CPLR §§ 9401, 9404, 9406, VIII, Rules of the Court of Appeals for the admission of attorneys and counsellors-at-law (Judiciary Law Appendix) and the implementing regulations of the defendants.

Dated: New York, New York
August 9, 1968

RABINOWITZ, BOUDIN & STANDARD
Attorneys for the Plaintiffs
30 East 42nd Street
New York, New York 10017

TO: HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Defendants
80 Center Street
New York, New York

Affidavit of Jonathan Lubell in Support of Motion for Three-Judge Court

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2938]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JONATHAN LUBELL, being duly sworn, deposes and says:

I am President of the New York City Chapter of the National Lawyers Guild, one of the plaintiffs in this action. I am a member of the bar of the State of New York. I have read the allegations of the complaint herein and incorporate the said allegations by reference in this affidavit.

The plaintiffs in this action seek an injunction against the enforcement of Judicial Law, § 90, CPLR §§ 9401, 9404 and 9406, and various implementing rules and regulations on the ground that they are illegal and void as violative of the Constitution of the United States. The substantiality of these federal constitutional issues in a case, which applies to admission to the bar the principles established by the United States Supreme Court in multifarious other areas of life, is obvious. Since the plaintiffs seek an injunction against the enforcement of these state laws, it is necessary that an order be made convening a three-judge court in conformity with 28 U.S.C. §§ 2281 and 2284.

The plaintiffs also seek an order granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no material issue as to the

material facts which are set forth in the complaint and in the statement filed by the plaintiffs, pursuant to Rule 9(g) of the General Rules of this Court. The complaint alleges, with supporting facts, that the State laws here involved are unconstitutional both on their face and as applied by the defendants.

Upon information and belief, the defendants have for many years implemented the State statutes involved by a variety of means which violate the First Amendment rights to association, assembly, belief and privacy and the right to due process of applicants for admission to the Bar. Their techniques have included the following:

(a) the use of reports and information received from or through Congressional Committees, the Attorney General of the United States, the Federal Bureau of Investigation and other governmental and quasi-governmental organizations.

(b) reliance upon lists of so-called subversive organizations compiled by the Attorney General, by Congressional Committee and by other governmental and non-governmental agencies.

(c) the examinations of applicants (without formal charges, evidence or counsel in so-called interviews or hearings, sometimes stenographically recorded, sometimes not, in which the defendant Committees inquire into the lawful political associations or constitutionally protected beliefs of applicants even to the point recently of inquiry as to the applicants' opposition to the Government's policy in Vietnam and the reasons for the applicants' participation in marches for peace and similar constitutionally protected activities.

(d) delaying or denying admission to the Bar of persons raising constitutional objections to such interrogations or of persons whose political opinions are deemed "radical" or otherwise disapproved of by Committee members.

It is therefore necessary and material to the issues in this case that the depositions of the defendants be taken and that there be a discovery, inspection and copying of their records relating to the matters set forth in the complaint due in this affidavit. Such discovery should include (i) requests for information concerning applicants made by the Committee, (ii) the responses thereto, (iii) the questionnaires of persons whose admission was delayed, denied or subject to further scrutiny, (iv) the interrogations of those persons, (v) the reports made by the Committee with respect to such persons. The plaintiffs agree of course that subject to further application to and order of the Court the names, addresses and other means of identifying the applicants should not be disclosed to the plaintiffs' counsel and that other appropriate conditions may be imposed so that their use is limited to this proceeding. Since a three-judge court is unlikely to convene immediately because of the summer vacation period and because the defendants have not yet filed an answer, the taking of depositions as to discovery and inspection can be directed by a single judge and will assist rather than interfere with the consideration of the substantive issues by the three-judge court. In view of the scope of the examinations, it is respectfully submitted that it be directed to be held immediately.

The plaintiffs finally seek an order granting them a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining the defendants from enforcing and implementing the statutes under review in this case. The

existence of these statutes has an inhibitory effect upon the political activities and the associations of the individual plaintiff and upon those of the members of the plaintiff organizations.

If the motion for summary judgment is likely to be heard and decided expeditiously in the near future, then the preliminary injunction may not prove necessary. But, on the other hand, if a delay does occur in the determination of the motion for a summary judgment, the plaintiffs should not be deprived of their associational rights and of their right to practice law if the Court agrees that on their face all of the statutes involved are unconstitutional. The Court will note that the individual plaintiffs' rights to practice in the Court is conditioned upon their admission to the State Bar.

Wherefore, it is respectfully prayed that this Court enter an order convening a three-judge court and directing the taking of depositions, discovery and inspection prayed for, and that the motion for a preliminary injunction and for summary judgment be referred to a three-judge federal district court.

JONATHAN LUBELL

Sworn to before me this
day of August, 1968.

DAVID G. LUBELL
NOTARY PUBLIC, State of New York
No. 60-7611865
Qualifed in Westchester County
Commission Expires March 30, 1969

Statement Pursuant to Rule 9(g)

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2938]

STATEMENT UNDER RULE 9(g)

Plaintiffs contend that there is no genuine issue of fact to be tried with respect to the following material facts:

1. Plaintiff Wexler is 24 years of age, a citizen of the United States, and a resident of New York; who was certified on October 26, 1967 as having passed the Bar examinations; Exhibit A to the complaint is an accurate copy of the relevant certificate of the State Board of Examiners.

2. Plaintiff Kaimowitz is 33 years of age, a citizen of the United States, and a resident of New York, who was certified on May 14, 1968 as having passed the Bar examinations, as appears from Exhibit B to the complaint.

3. Plaintiff, The Columbia Law Students Guild, is a non-profit association of law students with a membership of at least 70 at Columbia Law School. Many of its student members reside in the First and Second Judicial Departments and have applied to or intend to apply for membership in the New York Bar in said Departments.

4. Plaintiff, New York City Chapter of National Lawyers Guild, is a non-profit membership corporation organized under the laws of New York. Its membership includes attorneys licensed to practice in New York and law students from the various law schools in New York City intending to practice in the First and Second Judicial Departments.

5. The rule and practice of the defendant Appellate Divisions of the First and Second Judicial Departments is to

refer applications for admission to practice law to the respective Committees on Character and Fitness which then report back to the Appellate Divisions their findings as to the character and qualifications of the applicants.

6. The said Committees are authorized under CPLR, Rule 9404, to prescribe, subject to the approval of the Appellate Divisions, a Questionnaire and Statement which applicants are required to complete, as more particularly [sic]

7. Rule VIII-1, Rules of the Court of Appeals for the Admission of Attorneys and Counsellors-at-Law, N. Y. Judiciary Law appendix, provides that:

> "Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counsellor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State."

8. Rule VIII-4, Rules of the Court of Appeals for the Admission of Attorneys and Counsellors-at-Law, N. Y. Judiciary Law appendix, provides that the justices of the Appellate Divisions shall adopt for their respective Departments "such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

9. Section 90 of the N. Y. Judiciary Law provides that the Appellate Divisions shall admit applicants to the Bar "if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law."

Statement Pursuant to Rule 9(g)
68 Civ. 2938

10. CPLR, Rule 9406, provides that no person shall be admitted to practice unless he shall furnish satisfactory proof "that he believes in the form of government of the United States and is loyal to such government."

11. It is the practice of the defendant Committees to conduct personal interviews of the applicant. These interviews have customarily involved inquiry by Committee members into an applicant's political activities, speeches and beliefs and other conduct of a personal and private nature; the basis for the inquiry is often subjective reaction by the Committee member to an applicant's answer on the Questionnaire and Statement concerning the speeches, associations and beliefs of the applicants.

12. It is the practice of the defendant Committees to require an applicant to obtain and submit affidavits of "character and home life" (forms for these affidavits which the plaintiffs, STEPHEN MARTIN WEXLER and H. GABRIEL KAIMOWITZ, were required to submit are appended to the complaint as Exhibits F and G, respectively).

13. The plaintiffs Wexler and Kaimowitz and members of the Student Guild and the city Chapter and others cannot become members of the Bar unless they comply with the procedures and rules imposed by the defendants, as set forth above and in the complaint.

Respectfully submitted,

RABINOWITZ, BOUDIN & STANDARD
Attorneys for the Plaintiffs

Affidavit of Attorney General in Opposition to Motion for Three-Judge Court

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 2938]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DANIEL M. COHEN, being duly sworn, deposes and says:

1. He is an Assistant Attorney General of the State of New York and has been assigned to the defense of this suit, in which the Attorney General is appearing specially. The Attorney General denotes his appearance as special because he questions the jurisdiction of this Court over the subject matter of this lawsuit, which relates to the admission of members of the Bar of the State of New York.

2. Members of the bar of the State of New York are officers of the State Courts and those Courts have exclusive jurisdiction over the subject matter of such admission. It is not a function of this Court to determine the eligibility of persons to become members of the State Bar.

3. The procedures devised by the State in testing the character and fitness of applicants for admission may be questioned not only before the Committees-defendants, but also in the State Courts. The defendants, which include New York *appellate* courts, may be presumed to be not only as cognizant of applicable decisions relating to the provisions of the United States Constitution pertinent to admission procedures, but in addition, to be willing as this Court (whether in

the form of a single judgee or a three-judge Court), to assure the individual plaintiffs all the safeguards to which they may be entitled under the Constitution. *Matter of Weiss*, 20 N.Y. 2d 696, 697 (1967); *cf. Theard v. United States*, 354 U.S. 278 (1957), 281.

4. No basis has been shown for granting the equitable relief which is sought by plaintiffs and which is an essential element of any cause of action in which a three-judge Court may be convened. It may not be *assumed* that responsible state judicial officers will, upon the making of specific and appropriate objections to the answering of any questions which the plaintiffs may deem constitutionally objectionable, rule upon such objections, other than in good faith. The evidence is clearly to the contrary. New York Courts respect the United States Constitution and guard constitutional procedures in bar admission cases. *Matter of Weiss*, 20 N.Y. 2d 696, 697 (1967).

5. It would be presumptuous for this Court to assume, therefore, that our New York Courts would not correctly rule upon or protect the constitutional rights which the plaintiffs seek to assert here, without their ever having sought to present those rights specifically and properly before an appropriate state agency or tribunal. Any delay which may result in the processing of the applications of the individual plaintiffs herein may be attributed to their complete failure to file *any* "statement" at all and their apparent refusal to answer *any* of the questions included in the forms of "questionnaire and statement" referred to in the complaint. Since there clearly is not basis for equitable intervention by this Court, not only should this motion be denied but, in addition, the complaint should be dismissed.

Affidavit of Attorney General in Opposition to Motion for Three-Judge Court

WHEREFORE, deponent, reserving all other objections to the sufficiency of this complaint, respectfully requests that plaintiffs' application for the convening of a three-judge Court be denied and that by reason of the patent insufficiency of the complaint, such complaint be dismissed, no substantial federal question having been raised.

/s/ DANIEL M. COHEN

Sworn to before me this
23rd day of August, 1968

MARIA L. MARCUS
Assistant Attorney General
of the State of New York

Answer

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917]

The defendants, appearing specially herein by LOUIS J. LEFKOWITZ, Attorney General of the State of New York, and answering the complaint herein, allege:

FIRST: Deny each and every allegation of paragraphs "1", "2", "8", "10", "11", and "12" of the complaint herein.

SECOND: Deny any knowledge or information sufficient to form a belief as to the allegations of paragraphs "3" and "4" of the complaint and denies the standing of the plaintiff, Law Students Civil Rights Research Council to maintain this action.

THIRD: Deny each and every allegation of paragraph "6" of the complaint except that defendants admit that the Rules of the New York Civil Practice Law and the Rules of the Court of Appeals of the State of New York and New York Judiciary Law, §90, make provision for procedures relating to the admission of the Bar of the State of New York, as do the Rules of the First and Second Judicial Department.

FOURTH: Deny each and every allegation of paragraph "7" of the complaint, except that the defendants admit that the General Rules of the United States District Court for the Southern and Eastern District make provision for admission to the Bar of this Court and of the Eastern District.

FIFTH: Deny each and every allegation of paragraph "9" of the complaint except that defendants admit that prior to the admission of applicants for admission to the Bar of the State of New York, in the First Department, they conduct individual interviews of such applicants.

FOR A FIRST SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDANTS ALLEGE:

SIXTH: This Court lacks jurisdiction over the subject matter of the admission of attorneys to the Bar of the State of New York.

FOR A SECOND SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDANTS ALLEGE:

SEVENTH: The Courts of the State of New York have complete jurisdiction over the admission of applicants to the Bar of the State of New York.

FOR A THIRD SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDENTS ALLEGE:

EIGHTH: Repeats each and every allegation contained in paragraphs "FIRST" to "SEVENTH" hereof, inclusive.

NINTH: There are available by direct review in the New York Courts remedies to review the alleged constitutional procedural infirmities set forth in the complaint, and the decisions of the New York State Courts are, in turn, reviewable by the United States Supreme Court.

TENTH: New York provides all applicants for admission to the Bar with an adequate remedy at law to review both the procedures of and determinations of the defendants and the plaintiffs have not exhausted the remedies so provided to obtain a review of the defendants' procedures.

FOR A FOURTH SEPARATE, DISTINCT AND COMPLETE DEFENSE TO THIS ACTION, DEFENDANTS ALLEGE:

ELEVENTH: That the defendants, the Committees on Character and Fitness of the Supreme Court, First and Second Judicial Departments are the arms of the Judicial Branch of the State Government of the State of New York and are immune from suit in this Court.

Moreover, the relief sought from the Federal Court is excessive, oppressive, and beyond the scope of this Court's powers with regard to the internal operations of the New York judicial system.

WHEREFORE, defendants respectfully pray that the complaint herein be dismissed, with costs.

Dated: New York, New York
August 22, 1968

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Defendants,
Appearing Herein Specially
For the Defendants Served
80 Centre Street
New York, New York 10013

Answer

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2938]

The defendants appearing specially herein by LOUIS J. LEFKOWITZ, Attorney General of the State of New York, and answering the complaint herein, allege:

FIRST: Deny each and every allegation of paragraphs "1", "2", "3", "6", "15", "17", "18", "19", "20", and "21", of the complaint herein.

SECOND: Denies any knowledge or information to form a belief as to the allegations of paragraphs "4", "5", "7-A", and "7-B", of the complaint herein and denies the standing of the plaintiffs, Columbia Law Students Guild, and New York City Chapter of National Lawyers Guild to maintain this action.

THIRD: Admits the allegations of paragraphs "8", "9" and "10" of the complaint and admits the allegations of paragraph "11" of the complaint, except that the defendants deny as to the plaintiff Wexler, the parenthetical material set forth in the last sentence of paragraph "11".

FOURTH: Denies the allegations of paragraph "12" of the complaint except that the defendants admit that failure to answer any question set forth in the questionnaire and statement required to be filled out by the Committee on Character and Fitness *may* delay admission or result in the denial of an application for admission to the Bar.

FIFTH: Denies each and every allegation of paragraph "16-A" and "16-B" of the complaint except that the defendants admit that it is the practice of the defendant committees to conduct personal interviews of applicants for admission to the Bar and to require the preparation by applicants of certain forms of questionnaire and statement.

SIXTH: Denies any knowledge or information as to the allegations of paragraph "22" of the complaint herein.

FOR A FIRST SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDANTS FURTHER ALLEGE:

SEVENTH: The Courts of the State of New York have complete jurisdiction over the admission of the individual plaintiffs to the Bar of the State of New York.

FOR A SECOND SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDANTS ALLEGE:

EIGHTH: This court lacks jurisdiction over the subject matter of the admission of attorneys to the Bar of the State of New York.

FOR A THIRD SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDANTS ALLEGE:

NINTH: Repeats each and every allegation contained in paragraph "1" and "8" hereof inclusive.

TENTH: There are available by direct review in the New York Courts remedies to review the alleged constitutional procedural infirmities set forth in the complaint; and the decisions of the New York State Courts are, in turn, reviewable by the United States Supreme Court.

ELEVENTH: New York provides all applicants for admission to the Bar with an adequate remedy at law to review both the procedures of and determinations of the defendants and the plaintiffs have not exhausted the remedies so provided to obtain a review of the defendants' procedures.

FOR A FOURTH SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDANTS ALLEGE:

TWELFTH: That the defendants, the Committees on Character and Fitness of the Supreme Court, First and Second Judicial Departments, are arms of the Judicial Branch of the State Government of the State of New York and are immune from suit in this Court.

FOR A FIFTH SEPARATE,
DISTINCT AND COMPLETE
DEFENSE TO THIS ACTION,
DEFENDANTS ALLEGE:

THIRTEENTH: That all the defendants, in performance of their statutory duties dealing with the admission of attorneys to the Bar of the State of New York, perform a judicial function in the exercise of which they are entitled to judicial immunity from suit. Moreover, the relief sought from the Federal Court is excessive, oppressive, and beyond the scope of this Court's powers with regard to the internal operations of the New York judicial system.

WHEREFORE, defendants respectfully pray that the complaint herein be dismissed, with costs.

Dated: New York, New York
August 22, 1968

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Defendants,
Appearing Herein Specially
For the Defendants Served
80 Centre Street
New York, New York 10013

Opinion of Judge Motley

UNITED STATES DISTRICT COURT

S. D. New York

Sept. 25, 1968

Nos. 68 Civ. 2917; 68 Civ. 2938

Law Students Civil Rights Research Council Inc., *et al.*

v.

Wadmond, *et al.*

Stephen Martin Wexler, *et al.*

v.

The Supreme Court of the State of New York, Appellate Division, First Judicial Department, *et al.*

Memorandum Decision and Order for Three Judge Court

Motley, District Judge.

Plaintiffs in these two actions attack the constitutionality of certain New York statutes, rules and regulations relating to the character and fitness of those seeking admission to the New York bar. More specifically, plain-

tiffs claim, inter alia, that rights guaranteed them by the First and Fourteenth Amendments to the Federal Constitution are being violated by defendants' enforcement of the statutory and regulatory provisions under attack. Plaintiffs say that these statutes, rules and regulations are unconstitutional on their face and as applied.

The first statute in question is the New York Judiciary Law, McKinney's Consol. Laws, c. 30, § 90(1). That statute confers upon the Appellate Division of the Supreme Court in each Judicial Department the power to admit applicants to the bar upon the state board of law examiners certifying to it that the applicant has passed the required examination. The statute decrees that the Appellate Division shall admit such person to practice "if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor-at-law." The statute also contains the proviso that the applicant shall be admitted to the bar only if he has complied with the rules in all respects of the Court of Appeals of the State and the Appellate Division.

The Appellate Division is directed by statute (New York Civil Practice Law and Rules, Rule 9401) to appoint a committee for each Appellate Division District "for the purpose of investigating the character and fitness of every applicant for admission to practice." Every application for admission by a person who has been certified by the state board of law examiners must be referred to the committee for the district in which such person actually resides. (New York CPLR, Rule 9402). Unless otherwise ordered by the Appellate Division, "no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission." (N.Y.C.P.L.R., Rule 9404). "To enable the committee to make such investigation the committee,

subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire in which they shall set forth * * * all the information and data required by the committee and the appellate division justices." (N.Y. C.P.L.R., Rule 9404). The committee is enjoined by statute from issuing its certificate to any person and the Appellate Division is precluded by the same law from admitting any person to practice, unless such person, inter alia, shall furnish satisfactory proof to the effect "that he believes in the form of the government of the United States and is loyal to such government." (N.Y.C.P.L.R., Rule 9406).

Rule VIII of the Rules of the Court of Appeals For Admission of Attorneys and Counselors-At-Law (Judiciary Law-Appendix) requires every applicant to "produce before a Committee on Character and Fitness * * * and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides."

Plaintiffs in 68 Civ. 2938 allege in their complaint that the Judiciary Law § 90, C.P.L.R. Rules 9401-9406, and Rule VIII of the Court of Appeals lack sufficient standards and are in violation of, inter alia, the First and Fourteenth Amendments.[1]

With greater specificity, these plaintiffs allege that Rule 9406: 1) improperly requires an applicant to bear an unlimited and indefinite burden of proof of his belief in and loyalty to the form of our government; 2) is unreasonably vague; and 3) improperly makes belief in our form of government a condition of admission to the bar.

[1] Complaint, para. 15(a).

Also, plaintiffs say belief in our form of government is not reasonably related to the legitimate objectives of the state in determining character and fitness.[2]

Plaintiffs in 68 Civ. 2938 then assail in their complaint certain questions propounded by the Committees on Character and Fitness of the First and Second Departments of the Appellate Division in their questionnaires. Examples of the questions under attack are the following:

> "20. Have you participated in activities of a public or private nature or in philanthropic, religious, or social services? If so, state fully.
>
> "21(A). Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member."[3]

* * * * * *

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[2] Complaint, para. 15(b).

[3] Questions 20 and 21(A) appearing in Questionnaire of First Department. Other questions attacked are:

"22. (A) Are you now or have you ever been a member of or affiliated in any way with any of the organizations or groups listed as subversive by the Attorney General of the United States?

(B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?

If your answer is yes to either subdivision of this question, give the following information:

Name and address of organization or group * * *

When you became a member or affiliated with it * * *

Period of your association or connection with it * * *

How and why you became associated or connected with it * * *

How and why you severed your connection with it, if you did."

"23. Have you ever participated in any way whatsoever in the activities of such organizations or groups? If so, to what extent."

"32. Have you written any articles for publication? If so, give the circumstances, the name of publication, the date of publication, and the title and subject matter of the article.

• • • • • •

"36. (a) Are you now, or have you ever been at any time (including the time during which you attended high school, college and law school, and including the time during which you engaged in military service or any community activity) a member of any club, association, society or organization or political party.

(b) If answer be yes, give the name, address and objects of each and every such club, association, society or organization or party and state the period of your membership and your position or title therein."[4]

The foregoing questions are challenged on the ground that they violate the First and Fourteenth Amendments. Plaintiffs say that they are: 1) overbroad and without reasonable limitation; 2) compel disclosure of political beliefs, associations, speech and activities protected by the First Amendment and make such factors relevant in determining admission to the bar; 3) compel disclosure of re-

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[4] Questions contained in Questionnaire of Second Department. Other questions attacked are:

"35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

(b) Are you now or have you ever been a member of any party or organization created for such purpose or for the propagandizing or the furtherance thereof?

(c) If answer is yes, state the name of the party or organization.

(d) Are you now, or have you ever been, a member of the Communist Party, or have you ever been enrolled as a member of the Communist Party?

ligious activities, beliefs and associations and likewise make such factors considerations in determining admission to the bar.[5]

Plaintiffs in 68 Civ. 2938 attack the constitutionality of the oaths required in the Committees' Questionnaires on virtually the same constitutional grounds set forth above.[6] The oaths required by the First Department are:

> "24(A) Do you believe in the principles underlying the form of government of the United States? State on a rider, in not less than 100 words, what you believe those principles to be.
>
> (B) Can you conscientiously and do you affirm that you are, without any mental reservations, loyal to the Government of the United States?"

The oaths required by the Second Department are as follows:

> "33. Do you believe in the principles underlying the form of government of the United States? Briefly state the reasons for your answers.
>
> "34. Do you conscientiously affirm (without any mental reservation) that you are loyal to the Government of the United States of America?"

Plaintiffs challenge on similar constitutional grounds the content of the personal interviews of applicants required by the Committees. Plaintiffs claim that improper inquiry is often made concerning applicant's First Amendment activities.[7]

Finally, plaintiffs assail the practice of the Committees in requiring applicants to obtain and submit affidavits of "character and home life" on the ground that this practice

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[5] Complaint, para. 15(c) and (d).

[6] Complaint, para. 15(e).

[7] Complaint, para. 16(a).

constitutes an unlimited and indiscriminate invasion of the applicants' privacy in violation of the Fourth and Fourteenth Amendments.[8] Similar allegations are made in the complaint in 68 Civ. 2917.[9]

Plaintiffs in both cases claim that the foregoing statutes, rules, regulations and practices have the effect of deterring and inhibiting the exercise of rights of speech, association and belief guaranteed by the First Amendment.

The relief sought by plaintiffs in each action is a declaratory judgment declaring the above statutes, rules, questions and practices unconstitutional and a permanent injunction enjoining defendants from enforcing same.

These actions are before this court on motions by plaintiffs to convene three-judge courts pursuant to 28 U.S.C. § 2281 et seq. Plaintiffs in 68 Civ. 2917 also move to consolidate the two suits pursuant to Rule 42(a), Fed.R. Civ.P. The latter motion and the motion to convene a three-judge court in 68 Civ. 2917 were referred to this court, with consent, by Judge Wyatt on August 27, 1968.

Only a three-judge district court operating under 28 U.S.C. § 2284 may enjoin the enforcement or execution of a state statute as unconstitutional. Such court must be convened where the constitutional issue or issues are not wholly insubstantial or obviously without merit. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962); Green v. Board of Elections of City of New York, 259 F.Supp. 290 (S.D.N.Y. 1966), aff'd 380 F.2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840 (1968). Without in any way passing on the substantiality of other constitutional issues raised by plaintiffs, the court finds certain of the constitutional issues not wholly insubstantial.

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[8] Complaint, para. 16(b).

[9] See paragraphs 6, 8, 9, 10.

C.P.L.R. Rule 9406 requires an applicant for admission to the bar to prove his belief in the form of the government of the United States and his loyalty. A substantial constitutional question is raised as to whether placing the burden of proof on the applicant will not deter speech and association protected by the First and Fourteenth Amendments when the consequences of failure of proof are severe and the matter to be proved is difficult of definition. Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)

A substantial question is raised as to whether the language of C.P.L.R. Rule 9406 and the required oaths is unconstitutionally vague or broad and consequently infringes upon First Amendment freedoms. Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Keyishian v. Board of Regents, etc., 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967).

The questions set forth above which are contained in the Character Committees' Questionnaires call for a broad disclosure of all of the applicant's activities and associations. A substantial constitutional question is raised as to whether the threat of such disclosure will not deter the prospective member of the bar in his associations while in college and law school in violation of the First and Fourteenth Amendments; Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968).

Plaintiffs also make an adequate showing of the need for equitable relief. The nature of the wrong claimed is a "chilling" of speech and association while in college and law school, and the wrong claimed would not be remedied by an attack on the regulatory scheme during the process

of admission when the damage had been done. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).[10]

Accordingly, the motions to convene three-judge courts are granted and the cases are referred herewith to the Chief Judge of the Circuit. 28 U.S.C. § 2284.

The plaintiffs' motion in 68 Civ. 2917 to consolidate the two suits under Rule 42(a), Fed.R. Civ.P., is improperly presented at this time. The power of a single district judge in hearing an application to convene a three-judge court is limited to the jurisdictional inquiries of whether a substantial constitutional question is presented, a basis for equitable relief is presented, and 28 U.S.C. § 2281 is otherwise complied with. Green v. Board of Elections of City of New York, supra, 259 F.Supp. at 292; Idlewild Bon Voyage Liquor Corp. v. Epstein, supra, 370 U.S. at 715, 82 S.Ct. 1294. Such a motion might be heard by a single judge of the three-judge court after it is appointed, but then the decision by the single judge is subject to the safeguard of review by the full court before final hearing of the suit, 28 U.S.C. § 2284(5). The motion to consolidate is denied without prejudice to its renewal before either three-judge court.

So ordered.

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[10] The individual plaintiffs in 68 Civ. 2917 are presently law students and plan to apply for admission to the New York bar. One of the organizational plaintiffs in 68 Civ. 2938 is composed of law students similarly situated. The individual plaintiffs in 68 Civ. 2938 have passed New York's written bar exam and allege infringement of their political and civil rights while awaiting admission.

Motion to Dismiss

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

SIRS:

PLEASE TAKE NOTICE that the undersigned, having been informed by letter dated October 16, 1968, signed by United States District Judge Constance Baker Motley, that the three-judge panel appointed to hear the above-entitled cases will hear all motions in these cases on November 1, 1968, will move this Court, on all the pleadings, affidavits and other papers herein, at the opening of Court, at 11:45 A.M. in the Court of Appeals Court Room, 17th Floor, United States Court House, Foley Square, New York, New York 10007, for an order dismissing the complaints in the above-entitled actions, upon the grounds that: 1) this Court does not have jurisdiction of the subject matter of this action; 2) that this Court does not have jurisdiction over the persons of the defendants; and 3) that pursuant to Rule 3 to 6 and 12 of the Federal Rules of Civil Procedure, service of process upon the defendants allegedly served be vacated upon the ground that the plantiffs' affidavits of service patently indicate that the process served is not sufficiently served or legally valid; 4) that the complaints herein, upon their face, fail to state a cause of action; 5) that the subject matter of admission of attorneys to the Bar of the State of New York is a matter over which the Courts of the State of New York have exclusive jurisdiction, except for certain matters of Federal due process which are not pertinent here; 6) that there are available in the New York Courts remedies to review the alleged constitutional procedural infirmities set forth in the complaints herein; 7) that New York

provides all applicants for admission to the Bar with adequate remedies to review both the procedures and determinations of the defendants; 8) that the individual plaintiffs have not resorted to or exhausted the remedies so provided; and 9) that the defendants are arms of the judicial branch of the Government of the State of New York, are immune from suit in this Court and the functions of the defendants with which the plaintiffs seek to have this Court interfere concern the internal operations of those judicial bodies; 10) that the plaintiffs have failed to include as defendants to this action, parties indispensable to its determination; and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York, October 17, 1968.

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Defendants
Appearing herein "Specially"
For the Defendants Allegedly
"Served"
80 Centre Street
New York, New York 10013

TO: LEVY, GUTMAN & GOLDBERG, ESQS.
Attorneys for Plaintiffs Law Students, etc.
363 Seventh Avenue
New York, New York 10001

Motion to Dismiss
68 Civ. 2917; 68 Civ. 2938

RABINOWITZ, BOUDIN & STANDARD, ESQS.
Attorneys for Plaintiffs
Wexler, et al.
30 E. 42nd Street
New York, New York 10017

Clerk of the United States
District Court for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Also To: Alan H. Levine, Esq.
c/o Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Affidavit of Theodore R. Freschi

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THEODORE R. FRESCHI, being duly sworn, deposes and says:

I am the Secretary of the Committee on Character and Fitness of the Supreme Court of the State of New York, Appellate Division, First Department, a defendant in these actions. I submit this affidavit in opposition to the plaintiffs' motion for summary judgment and in support of defendants' motion to dismiss the complaints.

Upon information and belief, on May 9, 1968, a meeting was held attended by the justices of the Appellate Division, First Department and the Appellate Division, Second Department. At that meeting, which was the culmination of many months of study by both courts, a uniform Statement and Questionnaire was approved by both courts to be submitted to applicants for admission to the Bar in the First and Second Judicial Departments. A copy of that Statement and Questionnaire (as distributed by the First Department) is annexed hereto as Exhibit A.

The Statement and Questionnaire was printed and distributed in the First Department in June 1968, prior to the commencement of these actions. I understand that the Statement and Questionnaire is now being distributed to applicants in the Second Judicial Department.

Affidavit of Theodore R. Freschi
68 Civ. 2917; 68 Civ. 2938

Following the commencement of these actions, the Appellate Divisions for the First and Second Departments agreed to delete questions 28(a) and (b) and 29(a) on the annexed Statement and Questionnaire, which deletions have been put into effect immediately.

Annexed as Exhibit B hereto is the form for the affidavit of character being distributed to applicants in the First Department.

Sworn to before me this
12th day of November, 1968.

Statement and Questionnaire

Reproduced as Exhibit "A"

to Second Amended Complaint

in 68 Civ. 2917, *see supra* p. 19.

No.

AFFIDAVIT WITH RESPECT TO CHARACTER OF APPLICANT

Supreme Court of the State of New York

APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application

of

1. .....*

For Admission to the Bar

STATE OF
COUNTY OF } ss.:

2. ....., being duly sworn, makes the following statement:

3. Residence of affiant:

4. Nature of affiant's business:

5. Business address of affiant:

6. Length and nature of affiant's acquaintance with applicant:

   a. Residence of applicant:

   b. Persons with whom applicant lives (if known to affiant):

7. Affiant's conclusions as to applicant's moral character:

8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based:

9. IF THIS AFFIDAVIT IS MADE BY THE SPONSORING ATTORNEY, his sponsors' statement (see items 9 and 10 of instruction sheet) may be made here:

121/122
Freschi Affidavit: Exhibit B

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4. Nature of affiant's business:

5. Business address of affiant:

6. Length and nature of affiant's acquaintance with applicant:

   a. Residence of applicant:

   b. Persons with whom applicant lives (if known to affiant):

7. Affiant's conclusions as to applicant's moral character:

8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based:

9. IF THIS AFFIDAVIT IS MADE BY THE SPONSORING ATTORNEY, his sponsors' statement (see items 9 and 10 of instruction sheet) may be made here:

.....
(Signature)

Sworn to before me this.....

day of ....., 19.....

(DO NOT FORGET TO HAVE ALL AFFIDAVITS NOTARIZED)

(NOTE: No back shall be put on Affidavits)

•Give name of applicant as it appears on the certificate of the State Board of Law Examiners.

Affidavit of John F. Hennessy

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

JOHN F. HENNESSY, being duly sworn, deposes and says:

I am the Secretary of the Committee on Character and Fitness of the Supreme Court of the State of New York, Appellate Division, Second Department, a defendant in one of these actions (68 Civ. 2938). I submit this affidavit in opposition to the plaintiffs' motion for summary judgment and in support of defendants' motion to dismiss the complaints.

Upon information and belief, on May 9, 1968, a meeting was held attended by the justices of the Appellate Division, First Department and the Appellate Division, Second Department. At that meeting, which was the culmination of many months of study by both courts, a uniform Statement and Questionnaire was approved by both courts to be submitted to applicants for admission to the Bar in the First and Second Judicial Departments. A copy of that Statement and Questionnaire (as distributed by the Second Department) is annexed hereto as Exhibit A.

I understand that the Statement and Questionnaire was distributed by the First Department in June of 1968. The Statement and Questionnaire is now being distributed to applicants in the Second Department.

Affidavit of John F. Hennessy
68 Civ. 2917; 68 Civ. 2938

Following the commencement of these actions, the Appellate Divisions for the First and Second Departments agreed to delete questions 28(a) and (b) and 29(a) on the annexed Statement and Questionnaire, which deletions have been put into effect immediately.

Annexed as Exhibit B hereto is the form for the affidavit of Character and Residence now being distributed to applicants in the Second Department.

Sworn to before me this
12th day of November, 1968.

Form 1

Issued..... Office Telephone .....

Submitted..... Home Telephone .....

COMMITTEES ON CHARACTER AND FITNESS

SECOND JUDICIAL DEPARTMENT

APPLICATION FOR ADMISSION TO THE BAR AND STATEMENT REQUIRED PURSUANT TO ARTICLE 94 OF THE CIVIL PRACTICE LAW AND RULES

DIRECTIONS

(Read all these directions carefully before attempting to answer any question.)

1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.

2. Answers must be in black ink, in applicant's handwriting or typewriting, except as hereinafter indicated.

3. *Unless otherwise indicated, every question and every part of each question must be answered, even though the answer be negative.*

4. If the applicant cannot comply with any of the requirements, he must state in detail the efforts he has made to comply and why he cannot. Answers on information and belief will be accepted only in connection with matters which the applicant cannot be expected to remember because of extreme youth or other equally sufficient reason. All statements made on information and belief must be so designated in the *sworn statement, and the sources of information must be given.*

5. Should the space left for any answer be insufficient, the applicant shall complete his answer on a rider, specifying the number of the question to which it relates, attached to this *sworn statement.* Avoid riders whenever possible.

6. In stating addresses give street and number, if any, city, village and state or country. If an address is in New York City, give the borough *in addition* to the city. *If present address of applicant be in a village, give also the county.*

7. In giving a period which is continuing at the date of verification of this sworn statement, always give such period as continuing "to date."

To the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department:

The undersigned hereby applies for admission to practise as an attorney and counselor-at-law in all courts of the State of New York, and in support of such application submits the following sworn statement and the accompanying affidavits and other papers:

1. (a) State full name ..... (First) (Middle) (Last)

(b) Have you ever used or been known by any other name?.....If so, state in full each name (other than the name above given) which you have used or by which you have at any time been known, and the reasons for each such name.

125/126
Hennessy Affidavit: Exhibit A

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APPLICATION FOR ADMISSION TO THE BAR AND STATEMENT REQUIRED PURSUANT TO ARTICLE 94 OF THE CIVIL PRACTICE LAW AND RULES

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2. Answers must be in black ink, in applicant's handwriting or typewriting, except as hereinafter indicated.

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1. (a) State full name ..... (First) (Middle) (Last)

(b) Have you ever used or been known by any other name?.....If so, state in full each name (other than the name above given) which you have used or by which you have at any time been known, and the reasons for each such name.

(If change was made by court submit copy of petition, a certified copy of the order and certificate of compliance therewith.)

5/120 Affidavit: Exhibit A

2. State the following:

(a) Age, date, and place of birth.

(b) If a naturalized or derivative citizen, state date when and place where naturalization or right to derivative status was acquired, and submit certificate of naturalization or equivalent from any governmental office. (Such certificate will be returned.)

(c) Present residence (give full mailing address.

(d) Full name of all persons with whom you are presently living, and relationship to you.

(e) Length of actual residence in the State of New York.

3. State whether married or single.

If ever married, answer the following:

(a) When, where, and to whom married; give spouse's full name, together with any other name by which spouse has been known. (If married more than once, list marriages chronologically.)

(b) Do you reside with your spouse?

If not, state reasons for separation. (If through divorce, annulment or separation, submit copy of pleadings, certified copy of decree, judgment or order and proof of compliance with any directive portions thereof.)

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any governmental office. (Social Security Number will be required.)

(c) Present residence (give full mailing address.

(d) Full name of all persons with whom you are presently living, and relationship to you.

(e) Length of actual residence in the State of New York.

3. State whether married or single.

If ever married, answer the following:

(a) When, where, and to whom married; give spouse's full name, together with any other name by which spouse has been known. (If married more than once, list marriages chronologically.)

(b) Do you reside with your spouse?

If not, state reasons for separation. (If through divorce, annulment or separation, submit copy of pleadings, certified copy of decree, judgment or order and proof of compliance with any directive portions thereof.)

4. Give the following information relating to your parents:

	Father	Mother
(a)	Name in full.	
(b)	Born in United States (Yes or No)	
(c)	Whether living or not.	
(d)	Residence.	
(e)	Present or most recent occupation, if retired or deceased.	

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5. Give the following information as to residence.

(a) The cities and states or countries in which you resided for more than three months from the date of your birth until you first entered high school or its equivalent. (If answer is on information and belief, state source of information.)

(b) The full and exact address of your residence at the time you first entered high school or its equivalent.

(c) State every permanent residence you have ever had, in the United States or elsewhere, since first entering high school or its equivalent with exact address of each, and the month and year of the beginning and ending of each such residence. (Exclude military addresses unless off base.)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county (If in New York City, also give Borough)	State or Country
	Permanent Residences (List same chronologically. *Temporary residences*, which are residences *away from home* for educational, business or other special purposes, are to be listed on next page. *Do not interrupt the continuity of the periods of permanent residence by subtracting periods of temporary residence.*)		
From to			
From to			
From to			
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(c) State every permanent residence you have ever had in the United States or elsewhere, since first entering high school or its equivalent with exact address of each, and the month and year of the beginning and ending of each such residence. (Exclude military addresses unless off base.)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county (If in New York City, also give Borough)	State or Country
	Permanent Residences (List same chronologically. *Temporary residences*, which are residences *away from home* for educational, business or other special purposes, are to be listed on next page. *Do not interrupt the continuity of the periods of permanent residence by subtracting periods of temporary residence.*)		
From to			
From to			
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From to			
From to			
From to			
From to			

(Continue permanent residences if necessary, and give temporary residences on next page.)

(Permanent Residences Continued)

Period (Give month and year of beginning and ending.)	Street and Number	City or village, town and county (If in New York City, also give Borough)	State or Country
From to			
From to			
From to			
From to			

(d) Temporary Residences

(These include only residences **away from home** for educational, business or other special purposes except summer vacations. Do not interrupt continuity of periods of permanent residence, to be given above, **by subtracting periods** of temporary residence.)

From to			
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6. List **all schools** below college grade attended, giving **month and year** of the beginning and ending of attendance at each.

Name or designation of school	City, town or county	State	Month and year

Did you graduate from High School?.....Date of Graduation?.....

7. List **college or colleges** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

8. If you did not receive a college degree before entering law school give date of filing **Law Students Qualifying Certificate**.....

9. List **law schools** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

10. List any other schools of any kind or pursued any course of studies, in addition to those hereinabove mentioned.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

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Did you graduate from High School?.....Date of Graduation?.....

7. List **college or colleges** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

8. If you did not receive a college degree before entering law school give date of filing Law Students Qualifying Certificate.....

9. List **law schools** attended, giving **month and year** of the beginning and ending of attendance at each, and degrees received. If you did not receive a degree, state the reason.

Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

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Name	City or Town	State or Country	Degree	Month and Year of Beginning and ending of Period or Periods of Attendance, Indicating Summer Sessions Separately	Hours of Beginning and Ending of Daily Attendance. If Hours for Classes Varied, Give Outside Daily Hours

11. (a) Have you ever been denied admission to any school, college, law school, or other similar institution? If your answer is yes, state the facts:

.....

.....

(b) Have you ever been placed on probation, or dropped, or suspended or expelled from, or have you withdrawn from or left any institution of learning, **or otherwise been subjected to discipline, by any such institution,** or requested or advised for any reason to discontinue your studies therein temporarily or otherwise?
If your answer is yes to either (a) or (b), give the name of any such institution and state the cause, circumstances and date of each such occurrence.

12. Have you ever been employed in any business or profession or any other occupation whatsoever, other than the law? If so, enumerate all such employments in chronological order. Include employments by members of family or other relatives and employments without monetary compensation. Submit letter on letterhead of employer or an affidavit from each such employer giving nature of employment, period of service, whether or not satisfactory and reason for termination.

Month and Year of Beginning and Ending of Period of Employment	Hours of Beginning and Ending of Daily Period	Name of Employer (Individual, partnership or corporation. Do not give name of an agent of employer.)	Address of Employer (Give street, number, city or town and state or country.)	Nature of Employer's Business	Position or Positions held by Applicant	Reason for Termination

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13. Have you ever been employed in or associated with any law office, law department or legal institution? If so, enumerate all such employments and associations in chronological order. Include employments by members of family or other relatives and employments without monetary compensation. Submit affidavit from each employer giving same information as required under question 12.

Month and Year of Beginning and Ending of Period of Employment	Hours of Beginning and Ending of Daily Period	Name of Employer (Individual, partnership or corporation. Do not give name of an agent of employer.)	Address of Employer (Give street, number, city or town and state or country.)	Nature of Employer's Business	Position or Positions held by Applicant	Reason for Termination

14. Have you ever been engaged on your own account in any occupation, business, or profession?..... If so, give in detail the nature and location thereof and the month and year of the beginning and ending of your engagement in or connection therewith. If any such business was carried on by you in partnership with others, give the names and addresses of all partners and the nature of the business. If the business was carried on by a corporation in which you owned an interest list its name, address, nature of the business and your connection with it. If any business or profession in which you engaged has been discontinued or your connection therewith has ceased state why and whether there are unpaid judgments, debts or claims or pending litigation.

15. Have you ever been discharged by any employer? If so, give the name of each such employer and attach your affidavit stating date, cause and circumstances in detail.

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Period					

14. Have you ever been engaged on your own account in any occupation, business, or profession?..... If so, give in detail the nature and location thereof and the **month and year** of the beginning and ending of your engagement in or connection therewith. If any such business was carried on by you in partnership with others, give the names and addresses of all partners and the nature of the business. If the business was carried on by a corporation in which you owned an interest list its name, address, nature of the business and your connection with it. If any business or profession in which you engaged has been discontinued or your connection therewith has ceased state why and whether there are unpaid judgments, debts or claims or pending litigation.

15. Have you ever been discharged by any employer? If so, give the name of each such employer and attach your affidavit stating date, cause and circumstances in detail.

16. Do you affirmatively represent that, in connection with all your employments for which no proof has been supplied, your services were satisfactory and that you were not discharged nor were your services terminated for cause, nor were you requested or advised to resign from or leave any such position?
If answer is no, give full details as to each such incident.

17. (a) Have you ever applied for admission to the Bar of the State of New York? If so, where, when, and with what result?

(b) Have you ever engaged in or has your conduct ever been called in question with reference to the unauthorized practice of law?

(c) Have you ever been employed by or otherwise connected with any person, firm, or corporation whose conduct was called in question on the subject of unauthorized practice of law while you were so employed or connected?

(d) Have you ever tried any action or proceeding, argued any motion, drawn legal papers, given legal advice or held yourself out as an attorney or counselor-at-law in this State? If you have done any of these, state the facts.

If your answer is yes as to any part of this question, state the matter fully.....

18. (a) Have you ever registered as a law student or applied to take or taken the bar examination in any country, state or jurisdiction other than the State of New York?

(b) Have you applied for admission to practice as an attorney or counselor in any country, state or jurisdiction other than the State of New York? If your answer to (a) or (b) is "Yes", state specifically the disposition made of the application or the result of the bar examination; if admitted, (a) give the name and address of each court by which admitted, the date of such admission, the periods of practice and all the office addresses where you have practiced, with the names and addresses of partners, if any and (b) whether you have ever been reprimanded, disciplined, suspended or disbarred as an attorney or counsellor-at-law or whether any charges or complaints have ever been preferred against you, and if so, the nature of the charges and their disposition.

(Applicants admitted in other jurisdictions must submit proof from each Grievance Committee, or body entertaining complaints against lawyers, certifying as to whether charges have been filed with such Committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof. Instruction Sheet D may be obtained from Committee Office.)

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19. Are you registered for Selective Service?
If so, state:
(a) Local board number and address:

(b) Original classification and each reclassification, giving date of each such classification.

20. Have you ever been rejected for service in any of the armed services of the United States or of any other country? If your answer is "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photostat copy of any documentary proof thereof.

21. (a) Have you at any time or in any manner, served in any of the armed services of the United States, including reserves? If the answer is "Yes," state (a) when, where, and which service; (b) period and nature of service rendered: (c) if discharged give date and nature of discharge and submit photostat copy of each discharge certificate or release papers.

(b) Have you served in the armed forces (reserves or otherwise) of any country other than the United States of America? If the answer is yes, give name of country, inclusive dates of service, and reason for separation from service. (Submit photostat of each discharge or release.)

22. As a member of any Armed Forces have you been a subject of any charges or complaints, formal or informal, or have any proceedings been instituted against you or have you been a defendant in any courts martial?

If answer is "Yes," state the facts.

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(b) Original classification and each reclassification, giving date of each such classification.

20. Have you ever been rejected for service in any of the armed services of the United States or of any other country? If your answer is "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photostat copy of any documentary proof thereof.

21. (a) Have you at any time or in any manner, served in any of the armed services of the United States, including reserves? If the answer is "Yes," state (a) when, where, and which service; (b) period and nature of service rendered; (c) if discharged give date and nature of discharge and submit photostat copy of each discharge certificate or release papers.

(b) Have you served in the armed forces (reserves or otherwise) of any country other than the United States of America? If the answer is yes, give name of country, inclusive dates of service, and reason for separation from service. (Submit photostat of each discharge or release.)

22. As a member of any Armed Forces have you been a subject of any charges or complaints, formal or informal, or have any proceedings been instituted against you or have you been a defendant in any courts martial?

If answer is "Yes," state the facts.

23. State whether you have ever

(Answer each subdivision of this question "Yes" or "No.")

(a) testified or been called as a witness in any action, proceeding or investigation to which you were not a party;

(b) been ticketed, or summoned, or arrested, or taken into custody, or indicted, or convicted, or tried for, or charged with, or pleaded guilty to the violation of any law, ordinance, traffic or parking regulation or the commission of any felony, or misdemeanor, or been requested to appear before any prosecuting or investigative agency in any matter?
(Indicate all such incidents, including proceedings as a juvenile offender, no matter how minor the infraction or whether guilty or not. Although a conviction may have been expunged from the records by order of court, it nevertheless must be disclosed in the answer to this question.)

(c) failed to answer on the return date any ticket, summons or other legal process served upon you at any time? If so, was any warrant, subpoena, or further process issued against you as a result of your failure to respond to such legal process?

(d) been declared a ward of any court, or adjudged an incompetent, or have any proceedings been brought to have you declared a ward of any court or adjudged an incompetent, or have you been committed to any institution or been a paient in any institution for the care of persons suffering from mental or nervous disorders or drug addiction, drug abuse or alcohoism?

(e) been charged with fraud or any other matter involving moral turpitude?

(f) been a party to or otherwise involved in any action or proceeding, or investigation either civil or criminal, not covered by answers to the foregoing subdivisions of this question?

If your answer is "Yes" to any subdivision of this question, state the facts in detail and give in each case name and locality of court or agency, dates of beginning and termination of action or proceeding, and the judgment or other disposition below.

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24. (a) Are there any unsatisfied judgments against you? If so, list the same giving name and address of judgment creditor and the court by which judgment was rendered, together with the date and amount thereof and the nature of the claim on which it was based.

(b) Are you in default in the performance or discharge of any duty or obligation imposed upon you by any governmental agency or decree or order of any court including alimony and support orders and decrees?
If so, state the facts.

(c) Are you indebted to anyone? If so, list all debts stating name and address of creditor and amount, date, nature and status of indebtedness.

(d) Has any one ever asserted a claim or demand against you, which has not been made the subject of any action or legal proceeding? If so, state the facts and the present status of the matter.

(e) Have you ever asserted any claim or demand against any person, partnership or corporation, or governmental agency which has not been made the subject of any action or legal proceeding?
If so, state the facts and the present status of the matter.

25. (a) Have you ever held a license the procurement of which required proof of good character?.....
If so, as to each such license, state the date it was granted and the name and address of the authority granting it.

(b) If your application for such a license was not granted state the facts.

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(b) Are you in default in the performance or discharge of any duty or obligation imposed upon you by any governmental agency or decree or order of any court including alimony and support orders and decrees?
If so, state the facts.

(c) Are you indebted to anyone? If so, list all debts stating name and address of creditor and amount, date, nature and status of indebtedness.

(d) Has any one ever asserted a claim or demand against you, which has not been made the subject of any action or legal proceeding? If so, state the facts and the present status of the matter.

(e) Have you ever asserted any claim or demand against any person, partnership or corporation, or governmental agency which has not been made the subject of any action or legal proceeding?
If so, state the facts and the present status of the matter.

25. (a) Have you ever held a license the procurement of which required proof of good character?.....
If so, as to each such license, state the date it was granted and the name and address of the authority granting it.

(b) If your application for such a license was not granted state the facts.

(c) Have you ever held a bonded position?..... If so, specify the nature of position, dates, amount of bond, and whether or not anyone ever sought to recover on your bond or cancelled the same?

26. Have you ever organized or helped to organize or become a member of any society or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means?.....
If your answer is in the affirmative, state the facts below.

27. (a) Do you believe in the principles underlying the form of government of the United States of America?

(b) Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?

28. (a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?..... If so, state fully.

(b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college, indicate approximate amount of time spent and responsibility involved.

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29. (a) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges.

(b) Have you ever been disciplined, expelled, suspended, ordered to resign from any club, association, society or organization?.....If your answer is "Yes," state the facts.

30. If admitted, do you intend to practice law?..... If you do not intend to practice law state why.

31. Is there **any** incident in your life not called for by the foregoing questions which has any detrimental bearing on your character or fitness? If the answer is "Yes," state the facts.

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(b) Have you ever been disciplined, expelled, suspended, ordered to resign from any club, association, society or organization?.....If your answer is "Yes," state the facts.

30. If admitted, do you intend to practice law?..... If you do not intend to practice law state why.

31. Is there any incident in your life not called for by the foregoing questions which has any detrimental bearing on your character or fitness? If the answer is "Yes," state the facts.

32. (a) Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?.....

(b) Will you conscientiously endeavor to conform your profession conduct to them?.....

(THE FOLLOWING TWO PARAGRAPHS ARE TO BE COPIED BY THE APPLICANT IN HIS USUAL HANDWRITING IN THE SPACE PROVIDED BEFORE THE SIGNATURE OF THE APPLICANT.)

I understand that this application is a continuing application, and that I must give correctly the information herein sought as of the date of my appearance before the Appellate Division to be sworn in as an attorney and counselor-at-law. I will, therefore, before such appearance, notify the Secretary of the Committee as to any change in respect of any matter concerning which information is herein sought.

I will also submit such additional affidavits or papers, and supply such additional information as may be requested.

COPY FOREGOING TWO PARAGRAPHS HERE

Signature of applicant.....

(Must conform to name on Certificate of State Board of Law Examiners)

STATE OF .....
} ss.:
COUNTY OF .....

I, ..., being duly sworn, say: I have read the foregoing questions and have fully, truthfully and accurately answered the same. The foregoing answers are true of my own knowledge, except if stated to be made upon information and belief, and as to such answers, I believe them to be true.

Signature of applicant.....

(Sign as above)

Subscribed and sworn to before me this day of , 19 .

Form 2

NEW YORK SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT

IN THE MATTER OF THE APPLICATION

of

.....
(Insert name of applicant)

for Admission to Practise as an Attorney and Counselor-at-Law

Form for Affidavit of Character and Residence

PLEASE NOTE

The answers to all questions are to be written, preferably in typewriting, by or under the direction of the affiant.

It is desired that both the subject matter and the language of each answer shall be supplied by the affiant and not by the applicant.

Nothing not personally known to affiant should be stated.

STATE OF .....

COUNTY OF ..... } ss.:

....., the affiant, being duly sworn, deposes
(Name of Affiant)

and says that the answers to the following questions have been written by or under the direction of affiant, and that both questions and answers have been carefully read by affiant and that the several answers are true of affiant's own knowledge, except those stated to have been made on information and belief, and those stated to give the opinion or belief of affiant, and as to those answers, affiant believes them to be true.

1. (a) Home address of affiant (including County)
   (b) Business address.

2. Nature of business? (If a lawyer, state whether or not you are a **practising attorney** of the Supreme Court of the State of New York, and/or an attorney of any court or courts in any other state, country or jurisdiction, specifying each such state, country or jurisdiction, and give place of admission to the Bar, and approximate date of such admission.)

3. How long have you known the applicant personally?

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.....
(Insert name of applicant)

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3. How long have you known the applicant personally?

4. State whether you are related to applicant by blood or marriage, or if there is any business, professional or similar relationship between you and the applicant or his family?

(OVER)

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Exhibit B

5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parenthesis, but the particular activities should be specified.

6. How often have you come in contact with applicant during the entire period of acquaintance?
("Frequently" or "often" or other indefinite statement is not a satisfactory answer.)

7. What is your conclusion as to applicant's moral character?
(Reserve details for next question.)

8. State in detail the facts upon which your knowledge or opinion as to applicant's character is based.

9. Have you visited applicant's

(a) parental home;

(b) marital home, if any;

(c) any other home or place of abode applicant may have had?

[redacted]

10. (a) How often have you visited the parental, marital or other home or place of abode of applicant?

("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)

(b) During what years (stating approxiate dates)?

(c) At what addresses (listing them specifically)?

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(Reserve details for next question.)

8. State in detail the facts upon which your knowledge or opinion as to applicant's character is based.

9. Have you visited applicant's

(a) parental home;

(b) marital home, if any;

(c) any other home or place of abode applicant may have had?

[redacted]

10. (a) How often have you visited the parental, marital or other home or place of abode of applicant?

("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)

(b) During what years (stating approxiate dates)?

(c) At what addresses (listing them specifically)?

Sworn to before me this

day of 19

(Insert date)

.....
(Affiant to sign here)

.....
(Attesting officer to sign here)

.....
(Official designation)

Statement of Defendants Pursuant to General Rule 9(g)

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

Responding to the statement under Rule 9(g) submitted by plaintiffs in 68 Civ. 2938,

A. Defendants do not have sufficient information to determine whether genuine issues of fact remain to be tried as to the claims in paragraphs 1, 2, 3, and 4 of said statement, and therefore do not agree that no genuine issue of fact exists as to said claims, F.R.C.P. 56(f).

B. Defendants agree that no issue of fact exists as to the statement in paragraph 5.

C. Responding to the statements contained in paragraphs 6, 7, 8, 9, and 10, Defendants state that the provisions referred to in said paragraphs are set forth in Appendix A to Defendants' memorandum submitted on these motions, and respectfully refer to said provisions for their terms.

D. Defendants dispute the statements contained in paragraphs 11, 12, and 13, except acknowledge that the defendant Committees do conduct personal interviews of applicants in order to ascertain whether such applicants meet the statutory requirements for admission to the Bar, that applicants are required to furnish an affidavit of Character and Residence, and copies of the form for such affidavits are annexed as Exhibit B to the affidavits of Messrs. Freschi and Hennessy, submitted herewith; and Defendants agree that if Plaintiffs take no additional steps to process their applications for admission to the Bar, they cannot become members of the New York Bar.

Statement of Defendants Pursuant to General Rule 9(g)
68 Civ. 2917; 68 Civ. 2938

DEFENDANTS' STATEMENT

The following facts are not in dispute:

1. The present form of Statement and Questionnaire used in the First Judicial Department is annexed as Exhibit A to the affidavit of Theodore R. Freschi, except that questions 28 and 29(a) appearing on said form have been deleted.

2. The present form of Statement and Questionnaire used in the Second Judicial Department is annexed as Exhibit A to the affidavit of John F. Hennessy, except that questions 28 and 29(a) appearing on said form have been deleted.

3. The form of affidavit with respect to Character of applicants for admission to the Bar in the First Judicial Department is annexed as Exhibit B to the affidavit of Theodore R. Freschi.

4. The form of affidavit with respect to Character and Residence of applicants for admission to the Bar in the Second Judicial Department is annexed as Exhibit B to the affidavit of John F. Hennessy.

Respectfully submitted,

November 12, 1968

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By

Assistant Attorney General
Attorney for Defendants

Opinion of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

February 17, 1969

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*

v.

WADMOND, *et al.*.
STEPHEN MARTIN WEXLER, *et al.*

v.

The SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*.

68 Civ. 2917, 2938.

Before FRIENDLY, *Circuit Judge*, and BONSAL and MOTLEY, *District Judges.*

FRIENDLY, *Circuit Judge*:

These two actions for injunctive and declaratory relief, invoking our jurisdiction, 28 U.S.C. § 1343(3), to enforce the Civil Rights Act, 42 U.S.C. § 1983, challenge the constitutional validity of procedures for admission to the New York bar, both generally and particularly as applied in

the First and Second Judicial Departments.[1] The plaintiffs in 68 Civ. 2938 are three candidates certified as having passed their bar examinations, the Columbia Law Students Guild, and the New York City Chapter of the National Lawyers Guild. The plaintiffs in 68 Civ. 2917 are the Law Students Civil Rights Research Council, Inc., an organization of some 1,500 law students with chapters at sixty law schools including four in New York City, and three law students who plan to apply for admission to the New York bar when eligible. Both actions are sought to be maintained as class actions on behalf of all persons seeking or planning to seek such admission. The defendants are the Appellate Divisions and their Justices and the Committees on Character and Fitness for the First and Second Judicial Departments and their members.

Section 90(1) of the New York Judiciary Law, McKinney's Consol. Laws, c.30, provides

> Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of

[1] The state of New York is divided by law into four judicial departments. N.Y. Const. Art. 6, § 4; Judiciary Law § 70. The First Department embraces the counties of New York and Bronx; the Second, the counties of Richmond, Kings, Westchester, Putnam, Dutchess, Orange, Rockland, Nassau, Suffolk, and Queens. Judiciary Law §§ 70, 140.

> appeals and the rules of the appellate divisions relating to the admission of attorneys.

This provision is implemented by Article 94 of the Civil Practice Law and Rules enacted in 1962, which adopts rules previously promulgated by the Justices of the Appellate Divisions. The rules [2] comprising Article 94 direct the appellate division in each judicial department to appoint a committee to investigate the character and fitness of each applicant for admission, R. 9401; prescribe that "unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission," R. 9404; and authorize such committee, "subject to the approval of the justices of the appellate division, * * * to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his present and such past places of actual residence as may be required * * *, R. 9404. Rule 9406 directs:

> No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:
>
> 1. that he believes in the form of the government of the United States and is loyal to such government * * *

The complaints attack a number of these provisions as violating the First Amendment to the Constitution

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[2] Provisions of the Civil Practice Law and Rules which are denominated as Rules may be changed by the judicial conference of the state. See CPLR § 102 and Judiciary Law § 229.

as made applicable to New York by the Fourteenth. The statutory provisions, notably § 90(1) (a) of the Judiciary Law and the quoted portion of Rule 9406, are challenged as being so vague and impermissibly broad as to have a "chilling effect," see Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), on plaintiffs' exercise of their First Amendment rights. Rule 9406 is challenged as allowing investigation into mere beliefs and denial of admission for them and as placing on applicants a burden of proof they cannot constitutionally be made to bear. The questionnaires prescribed by the two committees are criticized as requiring disclosure of acts and associations beyond the scope of proper inquiry. Believing that substantial constitutional issues had been tendered, Judge Motley requested the Chief Judge of the Circuit to invoke a court of three judges, 28 U.S.C. §§ 2281, 2284, and this was done. Judge Motley reserved judgment on the motion made by plaintiffs in 68 Civ. 2917 to consolidate the two suits pursuant to Fed.R.Civ.P.42(a); we grant the motion and have considered the cases together. Plaintiffs have sought summary judgment or, if that not be granted, a preliminary injunction and discovery. The defendants have moved for dismissal of the complaint or, in the alternative, or dismissal so far as the complaint relates to the statutes[3] and remission of the issues concerning the questionnaires to Judge Motley.

I.

Before proceeding to the merits we must examine claims made with respect to the standing of the plaintiffs, the suability of the defendants, the failure to join the Court of Appeals or its members, and the desirability of abstention.

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[3] We shall use that term as embracing the Rules, see note 2.

With respect to the individual plaintiffs, defendants admit the standing only of the three who have passed the bar examination. They contend, however, that, so far as concerns the statutes, these three have no need for equitable relief since, if the character committee should refuse them certification on an impermissible ground, they can obtain an adequate remedy by applying to the appellate division and, if the state courts persist in refusal, by seeking review in the Supreme Court; and that, so far as concerns the questionnaires, their objections are at most a matter for a single judge since each questionnaire is effective only in part of the state. We find it unnecessary to evaluate this argument.[4] For we believe the three plaintiffs who are law students intending to apply for admission have standing to seek equitable relief since they have set themselves apart from the public at large sufficiently to have standing to protest statutes governing admission to the bar that may inhibit exercise of First Amendment rights during the period of their study. Cf. Gart v. Cole, 263 F.2d 244, 250 (2 Cir.), cert. denied, 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959); Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964); Overseas Media Corp. v. McNamara,

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[4] Defendants also argue that the plaintiffs who have passed the examination have, by presenting their certificates to the appellate division and obtaining questionnaires from the character committee, commenced "proceedings in a State court" within the anti-injunction statute, 28 U.S.C. § 2283, and that the grant of an injunction would violate that statute. Even if this were true, it would not prevent us from granting an injunction in favor of the law students. Further, we see no merit in the argument, quite apart from any question whether the Civil Rights Act creates an exception to § 2283. The purpose of the anti-injunction statute is to prevent a state court defendant from invoking the aid of a federal court to block an action instituted against him—not to prevent a state court applicant from seeking federal aid to eliminate what he considers an unconstitutional roadblock created by the state.

128 U.S.App.D.C. 48, 385 F.2d 308 (1967); Davis, Standing: Taxpayers and Others, 36 U.Chi.L.Rev. 601, 617-628 (1968). Since these students raise a substantial constitutional question with respect to at least one of the statutes, a court of three judges is required for that purpose; the argument that attack on the questionnaires should be remitted to a single district judge will be examined later in this opinion. We also have no occasion now to consider the standing of the various organizations that have joined in the complaints.

In considering whether an injunction or a declaratory judgment should be issued, we start from the principle of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that when officers administering a state statute act in a manner that exceeds constitutional limits, they have no claim to sovereign immunity. Against this is the equally well settled principle that a judge exercising his judicial function is not liable for damages under 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. 547, 553-555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

While the interest served by the latter principle in making the state judge free "to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants," without "fear that unsatisfied litigants may hound him with litigation charging malice or corruption," Pierson v. Ray, supra, 386 U.S. at 554, 87 S.Ct. at 1218, is an important one, its applicability to an injunction is by no means clear. See United States v. McLeod, 385 F.2d 734, 738 (5 Cir. 1967) (Wisdom, J.). We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by

those who are. Rather it would seem anomalous that while federal courts could entertain a complaint similar to the plaintiffs' if made with respect to other licensed professions, such as medicine or accountancy, they are powerless with respect to admission to the bar. The grant of injunctive relief in a case like this would not have the *in terrorem* effect on state judges that the threat of a subsequent damage action would have; rather, it would furnish a definitive ruling on a point of federal law for their future guidance, and, as shown above, fn. 4, would not infringe the policy expressed in the federal anti-injunction statute, 28 U.S.C. § 2283, proscribing injunctions that would stay "proceedings in a State court." The criteria set forth in Dombrowski v. Pfister, supra, for the grant of the extraordinary relief of injunction against the enforcement of a state statute are alleged to be present here. Plaintiffs do not challenge a state court's disposition of an individual case, but attack as "overly broad and vague regulations of expression," see 380 U.S. at 490, 85 S.Ct. at 1123, the rules and regulations promulgated and administered by the appellate divisions and their delegates. The alleged infringement of First Amendment rights of law students cannot be dissipated by the processing of particular individuals' applications for admission to the bar. These factors, which were "controlling on both the exercise of equitable power and the abstention issue" in Dombrowski, see Cameron v. Johnson, 381 U.S. 741, 755, 85 S.Ct. 1751, 14 L.Ed. 2d 715 (1965) (White, J., dissenting), make appropriate our consideration of equitable relief even though the defendants would be immune from liability in damages for their administration of the challenged procedures, see Saier v. State Bar of Michigan, 293 F.2d 756 (6 Cir.), cert. denied, 368 U.S. 947, 82 S.Ct. 388, 7 L.Ed.2d 343 (1961); Gately v. Sutton, 310 F.2d 107 (10 Cir. 1962); Clark v. Washington, 366 F.2d 678 (9 Cir. 1966) (judges and their delegates immune

for roles in disbarment proceedings). To hold otherwise would be to leave without a remedy a significant class of the deprivations of federal rights under color of state law, that Congress intended the federal courts to redress under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

We likewise see no force in defendants' argument that the suits should be dismissed, pursuant to Fed. R.Civ.P. 19, for failure to join the Court of Appeals or its members. While plaintiffs' attack on the "statutory scheme" governing admission to the bar takes in a Rule of the Court of Appeals, Rule VIII, the involvement of that rule does not necessitate joinder of its authors any more than an attack on the application of a statute requires joinder of the legislature. Moreover, the rule, adopted to implement Judiciary Law § 90, is attacked only for failing to furnish standards more precise than those found in § 90 and CPLR Article 94, and thus failing to rescue the procedure from the defects that allegedly inhere in the latter provisions. Section 90 and Article 94 have been enacted by the Legislature, and they place actual administration in the appellate divisions and their delegates, the committees on character and fitness, not in the Court of Appeals. There is no practical obstacle to adjudication of the constitutionality of this procedure in the absence of the Court or its members. Contrast Association For the Preservation of Freedom of Choice, Inc. v. Wadmond, 215 F. Supp. 648, 651-652 (S.D.N.Y.1963).

With respect to abstention, defendants have not made clear what debatable issues of construction state proceedings could resolve. Their contention is rather that admission to the bar is so peculiarly a matter of state concern that its resolution should be left to the state courts, subject, of course, to review by the Supreme Court. But that Court has given short shrift to similar claims in matters, equally of state concern, such as education, McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10

L.Ed.2d 622 (1963), and state employees, Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

We therefore proceed to the merits.

II.

We need not tarry long over the claim that the requirement of § 90(1) (a) of the Judiciary Law that entrance to the bar shall be allowed only to a person who "possesses the character and general fitness requisite for an attorney and counsellor-at-law" is impermissibly vague. We perceive no significant distinction between this and California's requirement of "good moral character," duplicated in many other states, which the Court said in Konigsberg v. State Bar of California, 366 U.S. 36, 40-44, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961), could not "well be drawn in question." Indeed, New York's requirement is somewhat more definite in specifying that the character traits required are those directly related to suitability for the practice of law. Once it is granted that the state can constitutionally require something more of applicants for admission to the bar than absence of the kind of criminal record that would warrant expulsion, as *Konigsberg* must be taken to have decided, the state must perforce use language of some generality. Such words, like others familiar in our law, acquire content through years of administration, see, e.g., Re Peters, 221 App.Div. 607, 225 N.Y.S. 144, aff'd, 250 N.Y. 595, 166 N.E. 337, rearg. denied, 252 N.Y. 572, 170 N.E. 148 (1927) (admission denied because of disbarment in another state); Re Greenblatt, 253 App.Div. 391, 2 N.Y.S.2d 569 (1938) (admission denied because of misrepresentations to character committee about applicant's dismissal from college for misconduct); Application of Cassidy, 268 App.Div. 282, 51 N.Y.S.2d 202, aff'd on rehearing, 270 App.Div. 1046, 63 N.Y.S.2d 840, aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1944)

(admission denied because applicant urged creation of armed units for forceful overthrow of government and made inconsistent statements indicating lack of veracity). See also Schware v. Board of Bar Examiners, 353 U.S. 232, 247, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (concurring opinion of Mr. Justice Frankfurter). Plaintiffs' affidavits and briefs are eloquently silent about instances where New York has unjustifiably denied admission for lack of "the character and general fitness requisite for an attorney and counsellor-at-law."

III.

Rule 9406 demands more discussion. Plaintiffs' initial criticism is procedural. They say the requirement that the applicant "shall furnish satisfactory proof" of belief in our form of government and loyalty to it unconstitutionally imposes a burden of proof in violation of Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). We think that case fairly distinguishable on two grounds: The statute condemned in *Speiser* applied to all veterans claiming property tax exemption, and the Court differentiated loyalty oaths required of "a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, creates serious danger to the public safety." 357 U.S. at 527, 78 S.Ct. at 1343. Lawyers, who are officers of the courts, fit the latter rubric. In Konigsberg v. State Bar, *supra,* 366 U.S. at 54, 81S.Ct. 997, the Court noted this distinction. Rule 9406 is also sustainable on the other ground taken in *Konigsberg,* 366 U.S. at 55, 81 S.Ct. 997, namely, the lack of "unequivocal indication" that it imposes a true burden of proof as distinguished from a burden of coming forward with evidence. We see no reason why New York may not impose the latter with respect to a subject concerning which the applicant has detailed knowledge but the committees would be required to make extensive investigation.

Plaintiffs' substantive attack is that Rule 9406 has the breadth branded as unconstitutional in such important recent cases as Baggett v. Bullitt, *supra*, 377 U.S. 360, 84 S.Ct. 1316; Elfbrandt v. Russell, 384 U.S. 11, 86S.Ct. 1238, 16 L.Ed.2d 321 (1966); and Keyishian v. Board of Regents, *supra*, 385 U.S. 589, 87 S.Ct. 675 (1967). When one examines the decisions, in contrast to culling phrases from them, they are plainly distinguishable. What the Court found defective in *Baggett* about the teachers' oath specified in the Washington laws of 1931[5] was the part exacting a promise that the affiant would "by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." The Court held that to require teachers to make so broad a promise provided no "ascertainable standard of conduct" and required "more than a State may command." 377 U.S. at 372, 84 S.Ct. at 1322. The defect in *Elfbrandt* was not the oath required of state employees, see 384 U.S. at 12, 86 S.Ct. at 1239, but the statute subjecting to prosecution for perjury and to discharge from public office anyone who during his "term of office or employment knowingly and willfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions." This was condemned as including "those

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[5] "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." 377 U.S. at 361-362, 84 S.Ct. at 1317.

who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities * * *," 384 U.S. at 17, 86 S.Ct. at 1241, a position foreshadowed by Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6L.Ed.2d 782 (1961). See also United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Haskett v. Washington, 294 F.Supp. 912 (D.D.C. 1968). Finally, what the Court struck down in *Keyishian* was a "complicated plan," 385 U.S. at 601, 87 S.Ct. 675, imposing a variety of ill defined restraints on teachers in New York's public schools and colleges.

Rule 9406 is not an oath; the oath required to be taken upon admission to the bar, Judiciary Law § 466, is the "constitutional oath" New York Constitution, Art. XIII, § 1, "that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of ———, according to the best of my ability." The constitutionality of this oath is established by Knight v. Board of Regents, 269 F.Supp. 339 (S.D.N.Y. 1967), aff'd per curiam 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812 (1968). Neither does Rule 9406 hang *in terrorem* over persons admitted to the bar, like the statutes condemned in *Elfbrandt* and *Keyishian*; it goes to belief at the time of admission only. The claim is rather that the alleged undue breadth of the Rule will have an unconstitutionally inhibiting effect on persons who contemplate seeking admission to the bar, notably law students, since they will fear lest becoming members in controversial organizations or engaging in protests will be taken to evidence lack of belief in the form of government of the United States or disloyalty to it.

If one assumes a proper implementation of Rule 9406, plaintiffs' apprehensions seem unwarranted. The Rule does not prescribe a formula to which the applicant must adhere but is rather a direction to the committees and the appellate divisions to guide them in performance of their

functions under the statutory scheme. It instructs these bodies, before forwarding an applicant to take the constitutional oath, to satisfy themselves through analysis of the factual data before them of his belief in and loyalty to the government he will swear to support. Defendants interpret this command as directing them "to test whether applicants for admission can truly subscribe to the 'constitutional oath of office' "; they read "the form of the government of the United States" to mean exactly what comes within the oath of support, and "loyalty to such government" to mean ability to take the oath in good faith. This construction of the statute by the very agencies charged with its administration is commended by reason. Since those who authored Rule 9406 were quite as aware as we are that the First Amendment lies at the very heart of our "form of government," we should not lightly suppose they had any idea that applicants should be refused admission to the bar for exercising their constitutionally guaranteed rights to freedom of speech, peaceable assembly and petition for redress of grievances. Since they were likewise entirely aware that the Constitution contains Article V, providing for amendment, we will similarly not suppose they intended admission to be refused to applicants who advocate amendment, even very radical amendment, by lawful means. Accepting defendants' construction, as we do, we could hold Rule 9406 to be invalid on its face only if the Constitution makes it impermissible to give any scrutiny to whether an applicant can honestly take a lawfully required oath.

We do not read Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), as prohibiting all inquiry to that end. The Court there recognized that the state need not seat a legislator who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." 385 U.S. at 132, 87 S.Ct. at 347. If the state may consider declarations or manifestations made con-

temporaneously with the taking of the oath, by the same token it may make a reasonable inquiry whether the oath taker is not in fact engaging in a solemn farce. The holding was rather that the information gathered by the special committee of the Georgia legislature had no sufficient tendency to negate Mr. Bond's position that he could conscientiously take the oath.

We therefore hold that Rule 9406 is not unconstitutional if implemented in accordance with its purpose. Before we proceed to plaintiffs' contentions concerning the questionnaires for its application prescribed by the Committees on Character and Fitness for the First and Second Departments, we must consider whether that subject is appropriate for adjudication by a court of three judges, 28 U.S.C. § 2281, or should be remitted to a single district judge.

IV.

The relevant statute, 28 U.S.C. § 2281, instructs, in "deceptively simple" terms, see Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 114 (2 Cir.), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The defendants apparently concede that a court of three judges would be required if the character committees of

all four judicial departments had prescribed the same questionnaire, or even if they had prescribed different ones but all were here attacked on similar grounds. The concession is well made since, apart from other possible bases for applicability of the statute, the attack would be upon "an order made by an administrative board or commission acting under [State] statutes," cf. Lathrop v. Donohue, 367 U.S. 820, 824-827, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (court order integrating state bar a "statute" within 28 U.S.C. § 1257), and it has long been settled that the ineptness of the 1913 amendment, 37 Stat. 1013, which added the reference to administrative orders but neglected to alter correspondingly the words "upon the ground of the unconstitutionality of such statute" should be overlooked. Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 292, 43 S.Ct. 353, 67 L.Ed. 659 (1923). But defendants contend that since the questionnaires under attack cover only two of the four departments, the case comes within the judge-made exception to § 2281 excluding controversies not of statewide importance. See Ex parte Collins, 277 U.S. 565, 567-569, 48 S.Ct. 585, 72 L.Ed. 990 (1928); Ex parte Public Nat'l Bank, 278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202 (1928); Wilentz v. Sovereign Camp, 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994 (1939); Rorick v. Board of Com'rs, 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242 (1939); Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); Hatfield v. Bailleaux, 290 F.2d 632 (9 Cir. 1961); D. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi.L.Rev. 1, 31-34, 55 (1964); D. Currie, Federal Courts 535-37 (1968).

We disagree for several reasons, any one of which would suffice:

The first ground lies in the difference between an attack on the order of an administrator as such and on the statute as applied by him. The distinction admittedly is elusive since, on the one hand, as said in Phillips v. United States,

312 U.S. 246, 252, 61 S.Ct. 480, 484, 85 L.Ed. 800 (1941), "some constitutional or statutory provision is the ultimate source of all actions by state officials," and, on the other, no statute is self-enforcing. Whatever the difficulties of articulation, there is still a perceptible difference between a challenge to a governor's "single, unique exercise" of power, 312 U.S. at 253, 61 S.Ct. at 484, under a statute of unquestioned validity empowering him generally to call out the national guard in case of war or "any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary," and the continuing administrative implementation of a statute, itself under attack, which is constitutional if applied in one way and not if in another. To put the point in a slightly different way, if the administrator is interpreting legislative policy, even a local application requires three judges; if he is making policy under a delegation, his local action can be tested by a single judge. See for further discussion Sardino v. Federal Reserve Bank, *supra,* 361 F.2d at 115; D. Currie, *supra,* 32 U.Chi.L.Rev. at 37-55; D. Currie, Federal Courts 534-35 (1968).

The second ground is that the actions of the two character committees under authority of the appellate divisions are not truly "local" within the teaching of the cases we have cited. It is true that the regulations of the committee in each department bear directly only on applicants who, being residents there, are seeking admission through the process established for them. But the effect of admission or denial is state-wide; admission in one department is the key to lawful practice throughout the State.

Thirdly, even if the questionnaires should properly be regarded as local administrative action, we would nevertheless retain jurisdiction as a three-judge court. The Supreme Court, in Louisville & N. R. R. v. Garrett, 231 U.S. 298, 303-304, 34 S.Ct. 48, 58 L.Ed. 229 (1913), expressly upheld the jurisdiction of the three-judge panel over nonconstitutional questions affecting the validity of the orders

also attacked on constitutional grounds. In Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80-81, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960), the Court restated the *Garrett* holding in an approving dictum, while deciding that the joinder of a nonconstitutional claim did not obviate the need for three judges on the constitutional one itself. Although both *Garrett* and *Lime Growers* concerned nonconstitutional attacks upon the same statute or order whose constitutional challenge required three judges, the same reasoning should apply when one attack is on the statute and the other on an order issued thereunder. In either case the overlap of evidence and argument is likely to be considerable. The policy of efficient use of judicial effort was pushed much further than this in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16L.Ed.2d 218 (1966), where there was an encroachment upon state interests in determining issues not independently within federal cognizance. Since some issues raised by the complaints plainly call for three judges, there is not the compelling argument for judicial economy that exists when dissolution of the panel at the outset would save the energies of the two judges relieved from further duty. Furthermore to consign the questionnaires to a single judge would entail the prospect of separate appeals, one to the Supreme Court and the other to the Court of Appeals.

In Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), the Supreme Court entertained an appeal from three judges in a case we cannot distinguish from our own. The calling of three judges were there upheld because the plaintiff attacked the passport statute on the ground of unconstitutional delegation; the court below and the Supreme Court both considered, in addition, the contention that the Secretary of State's regulations under that statute were invalid. Perceiving the situation before it as no different from where the additional claim is a nonconstitutional at-

tack on the same statute, the Supreme Court quoted from *Lime Growers* to establish that joining claims not themselves within the three-judge statutes does not dispense with the need for three judges for the consideration of all. See also Kurland, The Romero Case and Some Problems of Federal Jurisdiction, 73 Harv.L.Rev. 817, 838-45 (1960).

Finally, even if all the foregoing grounds should be wrong, and of course we do not think they are, we would nevertheless, in the exercise of discretion, continue to act together as regards the questionnaires. "Although a single district judge is without power to act in a case requiring three judges, the opposite is not true." Swift & Co. v. Wickham, 230 F.Supp. 398, 410 (S.D.N.Y. 1964), appeal dismissed for want of jurisdiction, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), aff'd, 364 F.2d 241 (2 Cir. 1966), cert. denied, 385 U.S. 1036, 87 S.Ct. 776, 17 L.Ed.2d 683 (1967). When the three-judge court has heard the entire case and lack of jurisdiction over one issue is at best debatable, sound policy calls for the three judges to decide that also, since a return of the issue to a single judge "would result in an invalid order if the return was erroneous, whereas the only consequence of erroneous retention of jurisdiction by the three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court, an uncertainty against which the plaintiffs may protect themselves by timely appeals to both courts." *Id.*

V.

The questionnaires in use in the two departments have been the subject of recent changes which demonstrate that the Committees on Character and Fitness and the Justices of the Appellate Divisions are well aware of the need to bring them in line with developing concepts of First Amendment rights. The complaint in 68 Civ. 2938 attacked ques-

tionnaires issued to plaintiffs Wexler and Kaimowitz early in 1968 but these had been altered by the two departments in May before the actions were brought. After the commencement of the actions the appellate divisions deleted questions, set forth in the margin,[6] which would have raised exceedingly serious problems under Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). See also Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968).

The questions to which most strenuous objection is made are the following:

> 26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ———— If your answer is in the affirmative, state the facts below.
>
> 27(a) Do you believe in the principles underlying the form of government of the United States of America?

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[6] "28(a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social service? ———— If so, state fully.

"(b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college, indicate approximate amount of time spent and responsibility involved.

"29(a) Give the names, addresses, objects and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges."

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States? ————

Taking these in reverse order, we fail to see what valid objection can be made to question 27(b). This differs from the New York Constitutional oath sustained in Knight v. Board of Regents, *supra*, 269 F.Supp. 339, aff'd, 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812, only in the inclusion of two additional phrases, "without any mental reservation" and a declaration of loyalty. The former phrase is included in the oaths all of us have taken as judges, and we cannot perceive any proper reason why any applicant for admission to the bar should cavil over it. We likewise find it impossible to see why requiring a future lawyer to declare his loyalty to the Constitution should be deemed objectionable when a promise to support it is not.[7] The suggestion that a prospective lawyer would fear that a declaration of loyalty to the Constitution would prevent his criticizing acts of the Government does not require discussion.

Question 27(a) is alleged to be impermissibly vague. It is claimed, for example, that an applicant might think he could not respond in the affirmative if he did not believe in the electoral college or a bicameral legislature. There is enough substance to this objection that we think the question should be eliminated or altered. The phrase "principles underlying the form of government," as distinguished from the simpler phrase used by Rule 9406 in addressing the appellate divisions and the committees, might be understood by an applicant to include many "principles" of a lower order than the essentials, democratic government and change by lawful methods. One who favored drastic reforms, albeit through constitutional means, might perhaps

[7] See also the oath which the Constitution requires of the President to "preserve, protect and defend" it. Art. II, § 1.

feel unable conscientiously to answer with a simple "yes"; yet the format of the question affords no additional space for explanation and the word "principles" is so vague as to create a problem even if opportunity for explanation were afforded. The question thus may share the defect of the oath in Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967), which the Supreme Court found capable of being read to require the affiant to disclaim any desire to "alter" the government by peaceful "revolution." It seems unnecessary to require such an imprecise declaration from an applicant for admission to the bar. Defendants say the question is intended merely to be "subsidiary to and supportive of" the constitutional oath; while we have held that the state can permissibly make some inquiry into the applicant's ability sincerely to take the oath, this purpose can be served by more circumscribed questions, such as 27(b) and the various factual questions contained throughout the questionnaires. Question 27(a) should thus be deleted or rephrased to remove the imprecision we have noted.

Question 26 also raises a difficult problem. Plaintiffs rely on cases such as *Baggett, Elfbrandt,* and *Keyishian,* cited in section III of this opinion, and also on Shelton v. Tucker, *supra,* 364 U.S. 479, 81 S.Ct. 247, and Schneider v. Smith, *supra,* 390 U.S. 17, 88 S.Ct. 682. Defendants distinguish the former as involving statutes that set up a bar to employment or decreed a termination of it, all in the field of teaching where the First Amendment dictates "particular concern for the safeguarding of academic freedom," Haskett v. Washington, *supra,* as contrasted to the mere inquiry here. They distinguish *Shelton* and *Schneider* upon the breadth of the questions asked. Defendants assert in the first instance that the principle remains sound that in order to protect "some interest clearly within the sphere of governmental concern" a state may "deny positions to persons supposed to be dangerous because the position might be used to the

detriment of the public." Speiser v. Randall, *supra*, 357 U.S. at 527, 78 S.Ct. at 1343. In Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1961), for example, the Court sustained a requirement that a candidate for public office swear that he was not engaged " 'in one way or another in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt." Further, although what is within the state's power of exclusion is necessarily within its power of inquiry, defendants argue that the latter is broader since the state is entitled to information from which it may develop that a person has in fact engaged in conduct justifying a bar to office that he has not been willing to admit. With respect to the scope of inquiry, Question 26 does not approach the requirement struck down in *Shelton* that every associational tie be disclosed, a requirement the Court held to be too indiscriminate in its sweep. The decisions in Beilan v. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1444 (1958); Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423 (1958); Nelson v. County of Los Angeles, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494 (1960); Konigsberg v. State Bar of California, *supra*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 and In re Anastaplo, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961), demonstrate that the Constitution does not prohibit a state from *asking* a public official or a candidate for admission to the bar whether he was ever a member of the Communist Party or, as in the *Nelson* case, of other organizations known to the member to advocate violent overthrow of the government.

The most obvious problems with Question 26 are the parenthetical past-tense verbs. While the draftsman probably intended these to relate to the period of the applicant's membership, this is not made clear; the question could be read as requiring an applicant to report membership in an

organization that advocated overthrow of the Government of the United States in 1860 but now would defend every syllable of the Constitution. The question should be corrected to clarify that the organization's teaching or advocacy of violent overthrow must have coincided in time with applicant's membership—a correction to which we cannot conceive the defendants would object. The next issue is whether the question must be further limited to cases where the applicant knew of the teaching or advocacy. Defendants do not assert they could constitutionally exclude applicants unless this was shown; their contention is rather, as noted above, that they should be permitted to frame their inquiry more broadly, that an applicant making an affirmative answer will be free to qualify this, and that the committees and the appellate divisions will then be in a position to determine the truth of the disclaimers. While there is force in this, no Supreme Court decision has gone beyond sustaining inquiry into membership in organizations known to the member to advocate forceful or violent overthrow, or in the Communist Party whose advocacy is evidently deemed a matter of common knowledge. We are not disposed to sanction inquiries of greater scope. Although Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957), could be distinguished as involving a sweeping legislative inquiry not limited to public employees or applicants for admission to the bar, it indicates the Court's aversion to questions concerning associations in the absence of *scienter*. The prospect of having to respond to an inquiry like Question 26 might have a deterring effect on exercise of the constitutionally protected right of association, and this can be justified only when "the subordinating interest of the State" is "compelling," Sweezy v. New Hampshire, *supra*, 354 U.S. at 265, 77 S.Ct. at 1219 (concurring opinion of Frankfurter, J.)—a test applied in Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960) and NAACP v. Button, 371 U.S. 415, 439, 83 S.Ct. 328, 9 L.Ed.2d

405 (1963). The state's interest in informing itself of the prior associations of candidates for the bar with subversive organizations can be adequately protected by a question more narrowly phrased. See Nelson v. County of Los Angeles, *supra*, 362 U.S. at 2-3 & n. 1, 80 S.Ct. 527.

Plaintiffs also attack Question 31. In the First Department this reads:

> Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? —— ———— If your answer is "Yes" state the facts.

In the Second Department the words "favorable or" are omitted. Plaintiffs contend that this catch-all has a serious *in terrorem* effect, especially in light of the directions at the head of the application:

> 1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.

We agree. The committees and the appellate divisions should be able to frame specific questions adequate to elicit the information they need; indeed they have demonstrated in the 31 other questions what plaintiffs consider an excessive ability in that regard. We find no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life demanded by Question 31.[8]

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[8] At the argument before us, David W. Peck, Esq., former Presiding Justice of the Appellate Division for the First Department, who appeared as counsel for the character committees, while contending Question 31 to be innocuous, expressed personal dislike for it and the opinion that there would not "be any great to-do about question 31."

We take a different view with respect to the last question requiring discussion in the text of this opinion:

> 32. (a) Have you read the Canons of Ethics adpoted by the American and New York State Bar Associations? ————
>
> (b) Will you conscientiously endeavor to conform your professional conduct to them? ————

The objection is to (b); plaintiffs contend that an applicant may conscientiously disagree with various Canons, which currently are being revised, and still deserve admission to the bar. We agree with that position but not with the conclusion plaintiffs draw from it. There is no vagueness here of the sort we found in Question 27(a); an applicant who has read the Canons knows just what standards he is being asked about. If he dissents from a particular Canon, he need only say so and explain why. We have been cited no evidence that such dissent on a reasoned basis would bar admission.

Finally, plaintiffs attack generally the practice of the committees of conducting individual personal interviews with applicants, at which, among other things, questions are posed "on the basis of the applicant's answers to the questionnaire." Plaintiffs allege that the scope of this questioning is sometimes so broad as to constitute an unwarranted invasion into the applicant's personal and political privacy. We do not understand plaintiffs to deny that a personal interview can be a permissible and very helpful aid to the committees in judging fitness for admission to the bar. Rather, their complaint goes to the scope of interviews conducted at a time when the questionnaires included inquiries since deleted or here disapproved by us. We have no reason to assume that as the scope of the committees' written in-

quiry is contracted, there will not be a similar adjustment in the focus of their spoken questions.[9]

VI.

We must now consider the appropriate disposition in light of the foregoing discussion. While we have power to issue an injunction against use of the questionnaires until Questions 26, 27(a) and 31 are omitted or rephrased and against resumption of use of the questions that have been discontinued, see, e.g., fn. 6, we find no immediate occasion for

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[9] Plaintiffs also challenge Questions 19-22, which call for information concerning the applicant's registration for Selective Service, rejection for and discharge from military service, and charges or complaints during military service. We do not understand plaintiffs to deny that all these are matters of public record, which, however, the committees could obtain only at great trouble and expense. It is not unreasonable for them to save this expense by drawing upon the applicant's personal knowledge. In reply briefs plaintiffs complain of a requirement, allegedly made by the Committee on Character and Fitness of the Second Department, that an applicant authorize the Clerk of his Local Board to allow members and staff of the Committee and the Appellate Division to have unrestricted access to his entire file. Although we would entertain considerable doubt about the propriety of this, we have not passed upon it since it was not alleged in the complaints or affidavits.

The complaints do raise question about the committees' requirement that applicants obtain and submit affidavits from third persons attesting to their good moral character. The forms of these affidavits have recently undergone radical curtailment. The First Department's current form says nothing about home visits by the affiant, and the Second Department's does not require the affiant to aver that he has visited the applicant's home but merely to say whether or not he has. While the latter provision is asserted to be an invasion of the applicant's personal privacy forbidden by Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and Camaro v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), those cases are so remote from the issue as not to warrant discussion.

doing so. Although "the court's power to grant injunctive relief survives discontinuance of the illegal conduct," United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953), a court is not required to award it, as that case demonstrates. Counsel for the character committees emphasized at the argument that "these State Courts are not stiff-necked about this thing." Considerations of comity to respected fellow-judges suggest they should be afforded a reasonable opportunity to reflect on our conclusions and perhaps take action that may obviate any occasion for an injunction. Law students will not suffer any serious chill during this brief interval, when the ultimate result is so clear. We believe also that if the three plaintiffs who have passed the examinations and have refused to fill out the questionnaires should decline to answer Questions 27(a) and 31 and answer Question 26 only as limited to membership in organizations known to them to be then teaching or advocating overthrow of the Government by force or violence, they would not find obstacles in their way; if our expectation should prove unfounded, they may apply to us for relief.

We shall therefore hold all motions until such date, not later than ninety days from the entry of this opinion, when counsel for the defendants shall report in writing what action, if any, the appellate divisions have taken. Such report shall be served upon plaintiffs' counsel; within twenty days thereafter, they may, if so advised, serve and file appropriate papers with respect to what further relief, if any, they deem required; the defendants shall answer within fifteen days. If counsel desire an opportunity for further argument, we will assign a date.

It is so ordered.

MOTLEY, District Judge (concurring in part, dissenting in part.)

In these consolidated cases plaintiffs challenge, on First and Fourteenth Amendment grounds, certain New York

statutes which contain the criteria for determining eligibility for admission to the bar.[1] One of these statutes provides that an applicant shall be admitted if the admitting court is satisfied that he "possesses the character and general fitness requisite for an attorney and counselor-at-law." New York Judiciary Law, § 90. The second statute provides that the applicant shall be admitted if, in addition, he has "furnished satisfactory proof to the effect that he believes in the form of government of the United States and is loyal to such government." New York Civil Practice Law and Rules, Rule 9406. These statutes are attacked on the ground that they are unconstitutionally vague and broad, resulting in a chilling effect upon the exercise of First Amendment freedoms by law students and those awaiting admission to the bar after having passed the written examination required. This judge, applying the concepts of vagueness and broadness holds: 1) the first statute is constitutional, but its interpretation, implementation and application by the defendant courts and their respective character committees is unconstitutional; and 2) the second statute is unconstitutional on its face and as interpreted, implemented and applied by defendants.

There is a rule of the New York Court of Appeals which implements the first statute by providing that every applicant must produce before the character committee and file with it "evidence that he possesses the *good moral character* and general fitness requisite for" an attorney.[2] [Emphasis Added.] This must be shown by the affidavits of two

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[1] The New York statutory and regulatory provisions and procedures governing admission to the bar are similar to those in most other states. See generally Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) and Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957).

[2] New York Judiciary Law, Appendix, Rule VIII-1, Rules of the New York Court of Appeals for Admission of Attorneys.

reputable persons residing in the city or county in which the applicant resides, one of whom must be a practising attorney.[3] According to the rule, the affidavits "must state that the applicant is, to the knowledge of the affiant, a person of *good moral character* and must set forth in detail the facts upon which such knowledge is based."[4] [Emphasis Added]. The term "good moral character" is not defined. The rule further provides that such "affidavits *shall not be conclusive,* and the [admitting court] may make further examination and inquiry through its Committee on Character and Fitness or otherwise."[5] [Emphasis Added]. Finally, the rule provides that the admitting courts, which are the four appellate divisions of the New York Supreme Court, shall adopt such additional rules as they may deem fit with respect to the requirement that the applicant prove his good moral character and general fitness.[6]

I. *Statement of the Facts*

In order to recognize the full dimensions of the constitutional issues posed here, it is necessary to examine closely the manner in which the foregoing statutes and rules were interpreted, implemented and applied by the appellate divisions which are defendants here and their respective character committees. To implement the Court of Appeals rule, defendants prepared instructions for persons furnishing affidavits and the affidavit forms, copies of which are

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[3] *Id.*

[4] *Id.* Rule VIII-2.

[5] *Id.*

[6] *Id.* Rule VIII-4. This rule reads:

"The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

attached to the original and amended complaints in the second action. The First Department's instructions advised affiants that their affidavits must "state that to the knowledge (or in the opinion) of the affiant the applicant is a person of good moral character", and must set forth "in detail the facts upon which affiant's knowledge of or opinion as to applicant's moral character is based." There is no definition of "good moral character" and the language of the statute, "character and general fitness requisite for an attorney and counsellor-at-law", is not used. The instructions additionally advised: "Affidavits covering home life should characterize family and home environment." There is no further amplification of this instruction. The Second Department combined its instructions with the affidavit form and entitled it: "Form for Affidavit of Character and Home Life." The affidavit form contained a series of questions to be answered by the affiants. These questions demonstrate the unconstitutionally vague and broad manner in which the first statute, Judiciary Law § 90, and the Court of Appeals Rule VIII was interpreted, implemented and applied by defendants. The exemplars are as follows:

> 7. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the *particular activities* should be specified.
>
> 9. What is your conclusion as to applicant's *moral* character? (Reserve details for next question)
>
> 10. Set forth in detail what you have *personally observed* in your associations with applicant which

leads you to the conclusion set forth under question 9, specifying, among other things, the moral qualities and personal traits observed in applicant's conduct, and his usual attitude toward those with whom he associates.

11. Have you visited applicant's

(a) parental home;

(b) marital home, if any;

(c) any other home or place of abode applicant may have had

(answer "Yes" or "No" to each subdivision).

12. (a) How often, approximately, during each week, month or year, have you visited the parental, marital or other home or place of abode of applicant?

("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 8, above).

(b) During what years (stating approximate dates)?

(c) At what addresses (listing them specifically)?

(d) Do such visits still continue? If not, when did they cease, and for what reason?

13. Have you on such visits met and conversed with:

(a) Applicant;

(b) The members of his family or household? If not with all, with which members?

14. (a) With what persons has the applicant lived during each period of your association with him in his home?

(If during period or periods covered by answer, applicant has lived with family, enumerate the members of the family during each period. If, during any period of association, he has lived apart from his family, enumerate the persons, if any, with whom he has lived during each such period.)

(b) With what persons does he live at the present time, if that be known to you?

15. Set forth in detail what you have *personally observed* as to the moral qualities and conduct of the members of applicant's family or other persons with whom he has lived:

(a) in parental home;

(b) in marital home, if any;

(c) in any other home or place of abode applicant may have had.

16. What do you say of applicant's conduct towards the members of his family or household during each period of your association with him in his home, and at present, if association still continues? (Give full details).

17. State fully any other facts within your knowledge, *or of which you have information,* which in your opinion have any bearing on the applicant's moral character or fitness to practise law, or which would be helpful to the Committee in determining the applicant's character and fitness. [Emphasis Added].

After these actions were filed, these affidavit forms and the instructions were changed. The First Department's form was greatly shortened and has omitted the instructions

regarding affidavits covering home life but asks the affiant to state:

> "6. Length and nature of affiant's acquaintance with applicant:
>
> (a) Residence of applicant;
>
> (b) Persons with whom applicant lives (if known to affiant).
>
> 7. Affiant's conclusions as to applicant's moral character:
>
> 8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based.

Again, the term "moral character" is not defined and the statutory language is not incorporated.

The Second Department has changed the title of its form to read: "Form for Affidavit of Character and Residence." It has omitted some of the above questions but still requests the following information:

> "5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the particular activities should be specified.
>
> 7. What is your conclusion as to applicant's moral character? (Reserve details for next question).
>
> 8. State in detail the facts upon which your knowledge or opinion as to applicant's character is based.

9. Have you visited applicant's

(a) parental home;

(b) marital home, if any;

(c) any other home or place of abode applicant may have had?

10. How often have you visited the parental, marital or other home or place of abode of applicant?

("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)

Missing from this form, again, is any definition of the terms "moral character" and the statutory language is not referred to therein.

In addition to the character affidavits, each judicial department, as authorized, has appointed a committee for the purpose of making an investigation.[7] Each committee is known as the Committee on Character and Fitness of the particular department. To enable the committee to make its investigation, another statute authorizes the committee, subject to the approval of the justices of the appellate division, "to prescribe and from time to time amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the Committee and the appellate division justices."[8] Two other statutes must be noted at this juncture. One provides that, "[u]nless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is

[7] New York Civil Practice Law and Rules, Rule 9401.

[8] *Id.* Rule 9404.

entitled to admission."[9] The other statute is the second statute referred to initially which provides that, "[n]o person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney • • •, unless he shall furnish satisfactory proof to the effect • • • that he believes in the form of the government of the United States and is loyal to such government."[10]

In accordance with the foregoing statutory mandates, defendants have prepared application forms. These forms, known as the "Questionnaire and Statement", presently contain 32 questions, all of which must be answered unless otherwise indicated. In addition, "every question and every part of each question must be answered, even though the answer be negative." The application form admonishes the applicant: "This is a statement made under oath." The applicant is further warned that, "failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law."

There are two application forms involved in these actions; one form is that used by the Committee on Character and Fitness of the First Department and the other by the Second Department's Committee. When the complaints in these actions were filed, these forms, unknown to plaintiffs, had just been amended in May 1968. Some of the questions objected to in the original complaints had been either deleted or changed. In June 1968, just prior to the filing of these suits, the First Department had already begun to distribute its amended form. After these actions were filed, the Second Department began to distribute its

[9] *Id.*

[10] *Id.* Rule 9406.

amended form to applicants. After the filing of these complaints, still other questions originally objected to were deleted from the amended forms.[11] The net effect of these changes and deletions, however, is to leave unchanged the First and Fourteenth Amendment challenge to the statutes. "The substance of the statutory and regulatory complex remains and from the outset • • • [plaintiffs'] basic claim has been that they are aggrieved by its application." Keyishian v. Board of Regents of Unversity of State of New York, 385 U.S. 589, 596, 87 S.Ct. 675, 680, 17 L.Ed.2d 629 (1967). See also, Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

In the original forms, questions 19, 20 and 21 of the First Department's form and questions 32 and 36 of the other were specifically objected to on First and Fourteenth Amendment grounds. Once again, the full flavor of the constitutional assault cannot be appreciated without a close scrutiny of how the committees interpreted and set about their task of implementing and applying the two basic statutes containing the criteria for admission to the bar. The following questions attest the "danger of tolerating, in the area of First Amendment freedoms, the existence of a • • • [regulatory] statute [i. e. C.P.L.R. 9406] susceptible of sweeping and improper application" NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); Dombrowski v. Pfister, supra.

First Department

> 19. (A) Are there any favorable or unfavorable incidents in your life, whether at school, college, law school, business or otherwise, not called for by the questions contained in this questionnaire or disclosed in your answers thereto?

[11] The first action was filed July 16, 1968 and the second action the next day.

If so, list them.

20. Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?

If so, state fully.

21. (A) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member.

Second Department

32. Have you written any articles for publication?

If so, give the circumstances, the name of publication, the date of publication and the title and subject matter of the article. (Include information relative to any articles for publication in any school or college paper or magazine.)

36. (A) Are you now, or have you ever been at any time (including the time during which you attended high school, college and law school, and including the time during which you engaged in military service or any community activity) a member of any club, association, society or organization or *political party?* [Emphasis Added].

(B) If answer be yes, give the name, address and objects of each and every such club, association, society or organization or party and state the period of your membership and your position or title therein.

Questions 22 and 23 of the First Department's form and question 35 of the other were also objected to by plaintiffs.

These questions read:

First Department

22. (A) Are you now or have you ever been a member of *or affiliated in any way* with any of the organizations or groups listed as subversive by the Attorney General of the United States? [Emphasis Added].

(B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?

If your answer is yes to either subdivision of this question, give the following information:

Name and address of organization or group • • •

When you became a member or affiliated with it • • •

Period of your association or connection with it • • •

How and why you became associated or connected with it • • •

How and why you severed your connection with it, if you did • • •

23. Have you ever participated *in any way whatsoever* in the activities of such organizations or groups? [Emphasis added].

If so, to what extent.

Second Department

35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

(b) Are you now or have you ever been a member of any party or organization created for such pur-

pose or for the propagandizing or the furtherance thereof?

(c) If answer is yes, state the name of the party or organization.

(d) Are you now, or have you ever been, a member of the Communist Party, or have you ever been enrolled as a member of the Communist Party?

The oaths prescribed by question 24 of the First Department's form and questions 33 and 34 of the other were objected to also. The First Department's question, which was virtually identical with the Second Department's question read:

24. (A) Do you believe in the principles underlying the form of government of the United States? * * * State on a rider, in not less than 100 words, what you believe those principles to be. (Handwritten)

(B) Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to the Government of the United States? * * *

The June 1968 amended forms deleted the following questions, *supra:* 19B, 20, 21(a) (First Department) and 32 and 36 (Second Department). The amended forms revised the remaining First Department questions as follows:

Question 19(A) was revised to read:

"31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is "Yes" state the facts.

No time limit is specified as to this question.

Question 21(B) was revised to read:

> "29. (b) Have you ever been disciplined, expelled, suspended, or ordered to resign from any club, association, society or organization? If your answer is "Yes", state the facts.
>
> Again, no time limitation is given.

Questions 22(A) and (B) and 23 were revised to read:

> "26. Have you ever organized or helped to organize or become a member of *or participated in any way whatsoever* in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means?
>
> If your answer is in the affirmative, state the facts below. [Emphasis Added].

Questions 24(A) and (B) were revised to read:

> "27. (a) Do you believe in the principles underlying the form of government of the United States of America?
>
> (b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to *and ready to support the Constitution of the United States?* [Emphasis Added].

The amended forms revised the remaining Second Department questions as follows: Questions 33 and 34 (principles underlying form of government and loyalty) were revised to read as the First Department's question 27, immediately *supra,* and questions 35 (pledged to aid change in form of government) was revised to read as the First

Department's question 26, *supra*, immediately preceding question 27.

After the suits were commenced and after the June 1968 amended forms had been distributed, in a tacit confession of error, defendants advised the court that the following questions had been deleted from both amended forms:

> 28. (a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?
>
> If so, state fully.
>
> (b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college indicate approximate amount of time spent and responsibility involved.
>
> 29. (a) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges.

In addition to the affidavits of good moral character and complete answers to questions in the Questionnaire and Statement, applicants, as a matter of practice, must appear for a personal interview before a member of the Committee on Character and Fitness. During the course of these interviews, applicants, as authorized by Court of Appeals Rule VIII-2, are questioned further about their "good moral character and general fitness", based upon the affidavits and answers on the Questionnaire and Statement. Plaintiffs alleged that these interviews often involve inquiry into the applicant's political activities, speeches, beliefs and conduct of a personal and private nature. Only a general denial of these allegations has been made in the

answers filed by defendants and no other denial of the validity of these allegations has been presented.

It also is essential to a full understanding of the constitutional claims made here to know who it is who challenges these statutes and why such challenge is made. In this connection we must know who the plaintiffs are and why they are here.

Plaintiffs in the first case are the Law Students Civil Rights Research Council, Inc. and three law students. The organizational plaintiff is a non-profit membership corporation organized under the laws of the District of Columbia with principal offices in New York City. Its principal objectives are: 1) "non-partisan research, study and analysis of the law with a view to eliminate prejudice and discrimination; to defend human and civil rights secured by law; and to make public the conclusions reached through such research"; and 2) to "provide a civil rights program where students may study with and assist members of the legal profession in the civil rights field on behalf of indigent, poor and distressed, or underprivileged litigants on civil rights cases."[12] The membership of the Council consists of law students, approximately 1500, in 60 law schools throughout the country. There are chapters of the organization in the City of New York at the law schools of Brooklyn College, Columbia, Fordham, and New York Universities. Membership in these chapters includes persons who are residents of either the First or Second Judicial Department and who have either applied for or intend to apply for membership in the New York Bar in those departments. The Council sues on behalf of these members. The complaint alleges that the work of the organization can succeed only if law students may freely engage in the organization's activities, uninhibited by the fear of subsequent delay in or denial of admission to practice because of prior

[12] Second Amended Complaint, paragraph 3.

involvement with the organization or its activities. The individual plaintiffs are all law students who plan to apply for admission to the New York State Bar upon graduation from law school.

Plaintiffs in the companion case are three individuals who have taken and passed the written examination required of all applicants for admision to the New York bar and two organizational plaintiffs. Two of the individual plaintiffs reside in the First Judicial Department and one resides in the Second Judicial Department. Two of these individuals have never been arrested and have never been suspended or dismissed from any school or university. One has never been suspended or dismissed from any school or university, but he has been arrested for distributing handbills in Albany, Georgia in the summer of 1963. Two of the plaintiffs are graduates of New York University Law School and one is a graduate of the Columbia University School of Law. One is presently an assistant professor of law at Columbia. Another plaintiff is a member of the staff of the Columbia University Center on Social Welfare Policy and Law. One has a master's degree in law.

The Columbia Law Students Guild, one of the organizational plaintiffs, includes law students attending Columbia University School of Law who have not yet graduated from law school and who have not yet taken steps to gain admission to the bar other than their pursuit of the required law studies. These students intend to apply for admission to the bar upon completing law school. The organization also includes students who have completed law school and who have applied for admission to the bar. The other organizational plaintiff includes in its membership law students from the various law schools in New York City. It is a chapter of the National Lawyers Guild. Both organizational plaintiffs are non-profit organizations devoted in the main to the promotion of law reform, facilitation of the

administration of justice, and the protection and fostering of civil rights and liberties.

But, more specifically, as related to the issues raised in this case, the Law Students Guild actively seeks to involve its members in the work of civil rights, civil liberties, and poverty organizations. The National Lawyers Guild, with which both organizational plaintiffs are affiliated, adopted a resolution at its national convention in July 1968 "which places particular emphasis on the concern of lawyers with the war in Vietnam, the draft, racism, and the crises of the poverty and the urban ghettos." [13] It is alleged in the complaint that the New York Chapter "seeks solution to these problems through a radical change in the structure of the nation's legal, political and economic system." [14] It is further alleged that in connection with these objectives, the members of the New York Chapter "have engaged and will engage in many activities not traditionally undertaken by other bar associations." [15] As in the first action, the complaint alleges that these organizations can succeed in their program objectives only if law students feel free to engage in such activities uninhibited by the fear of subsequent delay or denial of admission to practice because of affiliation with these organizations. Both of these organizations likewise sue on behalf of their members who have applied or who will be applying for admission to the bar.

All three organizational plaintiffs have the same standing to sue on behalf of their members as that found in the case on which they rely. N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). A close look at plaintiffs makes clear that they are not concerned here with whether a law student who has stolen money from his employer or who has murdered his mother may, nevertheless, be admitted to the bar. They are plainly concerned

[13] Amended Complaint paragraph 7b.

[14] *Id.*

[15] *Id.*

with whether political tests may be employed in determining eligibility.

Plaintiffs have moved for summary judgment. Defendants have answered and have moved to dismiss. There is no genuine issue as to any material fact alleged in the complaint, including the questions used by the respective character committees prior to and at the time the suits were filed and the questionnaires as amended and revised since the institution of these actions. Plaintiffs are entitled to judgment as a matter of law and, consequently, to the injunction they seek. Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (6th Cir. 1956), cert. den. 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868; Henry v. Greenville Airport Commission, 284 F.2d 631 (4th Cir. 1960); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

II. *The First Statute*

On the merits of the questions which the court finds dispositive of this case, plaintiffs must prevail.[16] If plaintiffs

[16] Plaintiffs also claim that: 1) the personal interview and character affidavits regarding home life which are required violate rights secured by the Fourth, Fifth, Ninth and Fourteenth Amendments; 2) the oaths required and disclosures compelled violate the Fifth and Fourteenth Amendments; 3) the statutes, rules and regulations and practices violate the Sixth and Fourteenth Amendments' guarantee of the right to the effective assistance of counsel and the independence of the bar; 4) the admission procedures do not comply with due process of law guaranteed by the Fourteenth Amendment in that they permit denial or delay of admission to the bar without providing for notice of charges, a full hearing at which counsel may be present, an opportunity for confrontation and cross examination, and specification of findings. The latter claim was made, in the main, in Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). Plaintiffs claim that defendants have not taken any action to comply with the *Willner* decision. That case held defendants' procedures lacking in due process since they failed to provide applicant with a hearing on the reasons for denial of his admission. Although defendants did not reply to this serious charge, it seems that a determination of this issue should await a case in which the procedural due process issue is clearly raised by the facts.

had brought these cases a decade or more ago, i.e., prior to the first Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), it is doubtful they could have found sufficient precedent with which to convince a court of the validity of their claims.[17] Today, however, a decade after Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed2d 796 (1957) and the first *Konigsberg* case, in which the identical issues lurked, plaintiffs' briefs sparkle with the jewel-like precedents of the intervening years in clearly analogous contexts. Waving their First Amendment freedoms on high—especially freedom to believe what one will, freedom of association, and the right to privacy in one's home—plaintiffs carry the banner for lawyers to have the same protection against state infringement upon these areas as has been won for public employees (especially teachers), Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Keyishian v. Board of Regents, supra, Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967); other licensed professions such as merchant seaman, Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968); Negroes, NAACP v. Button, *supra,* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); NAACP v. Alabama, *supra;* other civil rights advocates, Dombrowski v. Pfister, *supra;* Communists, Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d. 992 (1964); veterans, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2

[17] Note, Inquiries Into The Political Beliefs and Activities of Applicants For Admission To The Bar, 1 Colum. Survey of Hum. Rts. L. 33, 45 (1967-1968).

L.Ed.2d. 1460 (1958); and the population in general, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The first statute, attacked by plaintiffs on the grounds of vagueness and broadness, provides that an applicant who has passed the written examination should be admitted to the bar if the appellate division to which he has applied "shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor at law."

In the second *Konigsberg* case, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961) the good moral character standard was again involved as it had been in the *Schware* case and the first *Konigsberg* case, *supra*. In none of these cases, however, was the "good moral character" standard, *per se*, drawn into question as it is here on the grounds of vagueness and broadness. And since that time, the concepts of vagueness and broadness have not yet been applied by the Supreme Court to this standard or any other bar admission standard as they have been applied recently to statutes and oaths required of persons seeking public licenses or employment or assuming public office. Schneider v. Smith, *supra*; Cramp v. Board of Public Instruction, *supra*; Baggett v. Bullitt, *supra*; Elfbrandt v. Russell, *supra*; Keyishian v. Board of Regents, *supra*; Whitehill v. Elkins, *supra*.

In the second *Konigsberg* case, *supra*, 366 U.S. at 40, 81 S.Ct. at 1001, Mr. Justice Harlan, writing for the majority, pointed out that the validity of the requirement that an applicant for admission to the bar bear the burden of proof of "good moral character" had not been drawn into question there. He also noted that the requirement could not "well be drawn in question", citing the fact that such a requirement exists in all the states. But there was drawn in question the right of the state to put upon an applicant the burden of proving that he had not advocated

the overthrow of government by force and violence. In this connection, Mr. Justice Harlan pointed out that Konigsberg did not challenge the constitutionality of the California statute which forbade certification for admission to the bar of those who so advocated. The majority held, however, that the burden of proof on this issue had not been put upon applicants but upon the state and that in this connection an applicant could not obstruct a committee's inquiry into lawful standards of admission by refusing to answer questions. Konigsberg had refused to answer the question whether he had been a member of the Communist Party on the ground that the First Amendment protected him in his refusal to answer, although he swore that he had never advocated the overthrow of government by force. The majority disagreed with Konigsberg's First Amendment claim. Using a balancing test, the majority held that "the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, was clearly sufficient to outweigh the minimal effect upon free association" occasioned by the compulsory disclosure of political party membership in that case.

We, therefore, review here for the first time the moral character standard and the other bar admission standards involved here in the light of the vagueness and broadness concepts which the high Court has applied to other First Amendment cases since the second *Konigsberg* case, without reference to the obstruction rule or the balancing test used there.

The term "good moral character" has not been defined by the New York courts and counsel for defendants have not offered any definition. The term "general fitness" has been defined in only one case as follows: "* * * the words 'general fitness' have rather to do with a man's general experience in life, his family life, his associates,

his business or other experience, his general reputation and the like." Application of Brennan, 230 App. Div. 218, 227, 243 N.Y.S. 705, 715 (2nd Dept. 1930). And in one case it does appear that an applicant was disqualified on political grounds, *inter alia,* pursuant to the "general fitness" criterion, Application of Cassidy, 268 App.Div. 282, 51 N.Y.S. 2d 202 (2nd Dept. 1944). In that case, the applicant was an anti-communist who urged the creation of private armies to combat communism.

Even the Supreme Court in the first *Konigsberg* case, *supra,* and in *Schware, supra,* did not agree upon the meaning of the words "good moral character". There the Court acknowledged that this "unusually ambiguous" standard, "can be defined in an almost unlimited number of ways" and can be "a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." 353 U.S. at 263, 77 S.Ct. at 728. In the first *Konigsberg* case, the Court assumed, without deciding, for the purposes of that case that the proper definition was the one proposed by the state's counsel, i. e., "honesty, fairness and respect for the rights of others and for the laws of the state and nation," 353 U.S. at 264, 77 S.Ct. at 728. The Court took pains to point out that "neither the definition [of good moral character] proposed by counsel nor those appearing in the California cases equates unorthodox political beliefs or membership in lawful political parties with bad moral character." 353 U.S. at 263-264, 77 S.Ct. at 728. The Court also pointed out that the California cases appeared to define " 'good moral character' in terms of an absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude' " 353 U.S. at 263, 77 S.Ct. at 728. Mr. Justice Frankfurter, however, in his concurring opinion in *Schware, supra,* offered this definition: "From a profession charged with such responsibilities there must be

exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have throughout the centuries, been compendiously described as 'moral character.' " 353 U.S. at 247, 77 S.Ct. at 761. These definitions are, obviously, still subject to attack on vagueness grounds, but they at least define some of those qualities which might be demanded of lawyers.[18] Professor Walter Gellhorn of Columbia Law School has suggested that the standard for assessing the character of bar applicants be "dishonorable conduct relevant to the occupation" rather than good "moral" character.[19] The few New York cases in which applicants have been rejected on character grounds lend support to Mr. Justice Frankfurter's as well as Professor Gellhorn's view.[20]

In any event, it seems clear that a statutory framework which requires as a standard for admission to the bar that applicants possess the "character and general fitness requisite for an attorney", although vague, is not so vague, in the light of the foregoing definitions and its long and

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[18] *Id.* at page 40.

[19] W. Gellhorn, Individual Freedom and Governmental Restraint 150 (1956).

[20] In the cases decided by the New York courts in which applicants have been barred, it is clear that in each the conduct made the basis for refusal to admit has been dishonorable conduct relevant to the legal profession: e.g. Re Peters, 221 App.Div. 607, 225 N.Y.S. 144, aff'd 250 N.Y. 595, 166 N.E. 337, rearg. denied, 252 N.Y. 572, 170 N.E. 148 (1927) (admission denied because of disbarment in another state); Re Greenblatt, 253 App.Div. 391, 2 N.Y.S.2d 569 (1938) (admission denied because of misrepresentations to character committee about applicant's dismissal from college for misconduct); Application of Cassidy, 268 App.Div. 282, 51 N.Y.S.2d 202, aff'd on rehearing, 270 App.Div. 1046, 63 N.Y.S.2d 840, aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1944) (admission denied because applicant urged creation of armed units for forceful overthrow of government and made inconsistent statements indicating lack of veracity).

proper application in many cases, as to be unconstitutional on its face on the ground of vagueness.

We must, therefore, examine the manner in which the good moral character statute has been construed, implemented and applied by the defendant courts and their respective character committees. With the statute and the Court of Appeals Rule VIII as a guide, defendants have adopted vague and overly broad regulations and procedures which have resulted in a broad and sweeping inquiry into the background of bar applicants. These applicants have been required to answer questions which are vague and broad in violation of constitutional rights. cf. Schneider v. Smith, *supra*. As writers have pointed out, the terms vagueness and broadness actually involve three related problems. Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960). A question may leave an applicant guessing as to its meanings. This is referred to as conventional vagueness.[21] Examples of this are revised Question 31, *supra*, which reads: "Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness?"; and revised Question 27(a), *supra*, which reads: "Do you believe in the principles underlying the form of government of the United States of America?" cf. Baggett v. Bullitt, *supra*.

Secondly, a question may ask the applicant for too much information, such as those cited, supra, as having been deleted by defendants, asking for a listing of membership in all organizations and a detailing of activities in each over an indefinite period of years, leaving the person questioned guessing as to the relevance of what is asked. This is one type of broadness.[22] Shelton v. Tucker, *supra*. Another example of this is Question 9 of the Second Depart-

[21] Note, 1 Colum. Survey of Hum. Rts. L., at [pp. 54-55, *supra*] footnote 16.

[22] *Id.*

ment's present affidavit form: "Have you visited applicant's (a) parental home, (b) marital home, (c) any other home or place of abode applicant may have had?"

Finally, a question may define carefully the information it seeks, such as membership in the Communist Party, but cover both constitutionally protected and unprotected activity; this other type of broadness is sometimes called overbreadth.[23] Such overbreadth applies to present Question 26, *supra*, relating to membership in organizations which advocate overthrow of government by force. Recent Supreme Court decisions make it abundantly clear that neither Communist Party membership or any other membership can be used to deny admission to the bar without a showing that the applicant knows of the organization's unlawful objectives and has joined with or has acquired " 'specific intent' to further the illegal aims of the organization." Elfbrandt v. Russell, *supra*; Keyishian v. Board of Regents, *supra*; cf. Aptheker v. Secretary of State, *supra*; Haskett v. Washington, 294 F.Supp. 912 (D.D.C., Dec. 4, 1968).

Consequently, the regulations adopted by defendants, i.e., the affidavit forms and the questionnaire, fail to meet the standard of precision applicable to state regulations touching upon First Amendment freedoms. The standard was enunciated by the Supreme Court in NAACP v. Button, *supra*, where the Court ruled that "standards of permissible statutory vagueness are strict in the area of free expression," 371 U.S. at 432, 83 S.Ct. at 337, and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 371 U.S. at 438, 83 S.Ct. at 340. More recently, the Court reiterated that ruling in *Keyishian*, by quoting this passage from the *Button* case: "Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

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[23] *Id.*

371 U.S. at 433, 83 S.Ct. at 338. The Court then quoted from another decision in this area which is also singularly applicable here: "When one must guess what conduct or utterances will lose him his position, one necessarily will 'steer far wider of the unlawful zone • • •.' Speiser v. Randall, 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460]." 385 U.S. at 604, 87 S.Ct. at 684. For "[t]he threat of sanctions may deter • • • almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. at 433, 83 S.Ct. at 338. See also, United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Dombrowski v. Pfister, *supra;* cf. Aptheker v. Secretary of State, *supra.* Mr. Justice Black's incisive observation in his dissenting opinion in the second *Konigsberg* case is apposite here: "If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission in to the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might possibly be against, including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment." 366 U.S. at 73-74, 81 S.Ct. at 1019.

It is clear from all the questions cited, *supra,* that in applying the statutes attacked here, there has been an improper focus upon the applicant's political beliefs and associations and the improper use of a political test in determining admissions to the bar. Such an unlimited political focus and the use of a political test pursuant to a "good moral character" standard is foreclosed by the Supreme Court's decisions. In *Schware, supra,* the Court said: "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." 353 U.S. at 239, 77 S.Ct. at 756. As the Court there made clear, the focus must be on

the applicant's illegal political activity, if any, and the disqualification must be on this ground, not his political beliefs or associations.

There also has been an improper invasion of the right of privacy. The hallmark of civilization is that when a man closes the door to his home and retreats to the privacy thereof the eyes and ears of the state remain outside. Griswold v. Connecticut, *supra*. The state simply cannot ask every affiant who supports an applicant for admission to the bar with whom the applicant lives or what the inside of his parents' home is like. There must be some specific information relating to those qualities expected of one about to enter the legal professions before these questions can be asked of a particular applicant. Gibson v. Florida Legislative Investigation Committee, *supra*. Of course the state can, as it long has, require of applicants for admission to the bar that they have the "character and general fitness requisite for an attorney and counsellor at law." But these statutory words must be given such definition and application by defendants as will suggest to applicants and affiants "dishonorable conduct relevant to" the legal profession, not invasions of personal privacy and political beliefs and associations protected by the Constitution. As the Court said in Shelton v. Tucker, *supra*, "• • • even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. at 488, 81 S.Ct. at 252. And in *Keyishian*, the Court said: "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [lawyers] what is being proscribed." 385 U.S. at 604, 87 S.Ct. at 684.

This judge, therefore, holds that the "character and general fitness" statute is constitutional, but its inter-

pretation, implementation and application by the defendant courts and their respective character committees are unconstitutional.

III. *The Second Statute*

The second statute attacked here provides that an applicant for admission to the bar must furnish satisfactory proof to the effect that "he believes in the form of government of the United States and is loyal to such government." N.Y.C.P.L.R. Rule 9406. This is clearly a political test for determining admission to the bar in violation of rights secured by the First and Fourteenth Amendment to the federal constitution. cf. Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). The "First Amendment gives freedom of mind the same security as freedom of conscience." Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1944). It is simply too late in our constitutional history to try to reconcile the requirements of Rule 9406 with the constitutional axiom "that one be permitted to believe what he will." American Communications Ass'n v. Douds, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925 (1950). All that Rule 9406 does is "[t]o force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals • • • [and] to humiliate and degrade" the Bar. In re Anastaplo, 366 U.S. 82, 115-116, 81 S.Ct. 978, 996, 6 L.Ed. 2d 135 (1961) (Mr. Justice Black dissenting). It is nothing short of a complete irony that lawyers who fought for and won constitutional protections for other professions are the last to receive protection for themselves.

Rule 9406 is also unconstitutional on its face for another obvious reason. In an area patently involving First Amendment rights where the consequences of failure of proof are severe and the matter to be proved is difficult of definition, the burden of proof is explicitly upon the applicant to prove that he is loyal to the government. Speiser v. Randall, *supra*.

The statute, itself, Rule 9406, says: "No person shall receive said certificate [of character and fitness] from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect: 1) that he believes in the form of government of the United States and is loyal to such government." There is simply no room for the conclusion, which the majority reached in the second *Konigsberg* case, *supra*, that the state has *not* put the burden of proof on the applicant; there it is in plain language not subject to attack on grounds of vagueness. It is clearly not a burden of simply coming forward with some evidence or going forward once the state has made out a prima facie case. Where is that in the statute or evidence before us?

Present Question 26 (relating to membership in organizations advocating overthrow of the government by force) and the present oaths required in the Questionnaire and Statement (relating to the substance of C.P.L.R. 9406) is the method by which this burden is initially put upon the applicant. The answers given to Question 26 and the oaths, which are in the form of yes and no questions, may lead to further questioning upon the personal interview. This has never been seriously denied by defendants and is clearly authorized by the requirement that an investigation be made. N.Y.C.P.L.R., Rule 9401. Consequently, in this case, as in Speiser v. Randall, *supra*, more is involved than the taking of a conclusive oath of

non-criminal political conduct such as was involved in the oath cases referred to by the majority here as justification for requiring the second question oath of lawyers. In those cases, the Supreme Court sustained the validity of loyalty oaths required of public employees, Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); candidates for public office, Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1951); and officers of labor unions, American Communication Ass'n v. Douds, *supra*. But, as the majority points out in *Speiser*, "If the person took the oath he retained his position. The oath was not part of a device to shift to the office holder the burden of proving his right to retain his position." *Id.* 357 U.S. at 528, 78 S.Ct. at 1343. Here as in *Speiser*, the answers to questions 26 and the oath questions are "only a step in a process throughout which the [applicant] must bear the burden of proof." *Id.* The applicant may be questioned indefinitely and may be required to produce additional affidavits. In this process, an applicant must obviously defend his negative answer, expose and defend his writings, his speeches, his membership in various organizations and his political beliefs.

The procedures here do not involve a standard of proof which would require the character committees to go forward to prove disqualification on grounds of illegal political activity once the applicant has made a prima facie case. The committee may delay its interrogation indefinitely or deny admission altogether, as the Questionnaire and Statement warn, for failure to answer fully any question.

Defendants, in their brief, do not even make an attempt to dull the luster of one of plaintiffs' brightest gems, Speiser v. Randall, *supra*; for there is the heart of plaintiffs' case. Questions relating to loyalty to the government

clearly tread upon First Amendment territory. Consequently, as the Court said in *Speiser*, "Where the transcendant value of speech is involved due process certainly requires in the circumstances of this case that the State bear the burden of persuasion" to show that the applicant is guilty of illegal political conduct. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." 357 U.S. at 526, 78 S.Ct. at 1342.

The burden of proving loyalty to the government here, as in *Speiser*, can have but one effect on a prospective lawyer's First Amendment freedoms, and that is a chilling effect if not a freezing one. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526, 78 S.Ct. at 1342. See also Elfbrandt v. Russell, *supra*, 384 U.S. at 17-18, 86 S.Ct. 1238, and Abington School District v. Schempp, 374 U.S. 203, 289-290, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). (Mr. Justice Brennan concurring). Moreover, a person who must spend long years in preparation and invest large sums of money to enter the legal profession is clearly going to be more prone "to steer far wider of the unlawful zone."

Here an applicant for admission to the bar has the burden of proving that he is loyal to the government. If in the opinion of some members of the character committee he should fail in this burden, he is denied the requisite certificate. This means that the applicant is denied the opportunity to enter the profession for which he has spent large sums of money and much time in study. "So far as I am concerned the consequences to the applicant whether considered from a financial standpoint, a

social standpoint, or any other standpoint I can think of, constitute a more serious 'penalty' than that imposed upon Speiser," Konigsberg v. State Bar of California, *supra*, 366 U.S. at 77, 81 S.Ct. at 1021, Mr. Justice Black dissenting.

If, as in *Speiser*, the state cannot constitutionally impose upon a veteran seeking a tax exemption the burden of proving loyalty to our government, by what reasoning can the state constitutionally impose such burden on one seeking a license to practice law? Defendants did not answer this question to the satisfaction of this court and did not cite any case to sustain their position other than the second *Konigsberg* case where the Court explicitly found the burden was not on the applicant.

Finally, Rule 9406 is likewise unconstitutional on its face since it lacks sufficient standards for determining who shall be admitted to the bar. It has that same quality of "extraordinary ambiguity" condemned by the Court in describing the statutory framework in *Keyishian, supra*, 385 U.S. at 604, 87 S.Ct. 675. There vague statutory language was held unconstitutional. One statute required the discharge of a teacher for "the utterance of any treasonable or seditious acts or words or the doing of any treasonable or seditious act", *Id.* at 593, 87 S.Ct. at 678. Another statute barred persons from employment as teachers who "by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. *Id.* at 599, 87 S.Ct. at 682. The language of Rule 9406 is equally vague. The language of Rule 9406 is "wholly lacking in 'terms susceptible of objective measurement.'" *Id.* at 604, 87 S.Ct. at 684. And "men of common intelligence must necessarily guess at its meaning and differ as to its application * * *." Baggett v. Bullitt, *supra*, 377 U.S. at 367, 84 S.Ct. at 1320. The words "loyal to such govern-

ment" are no more definite than the phrase "'respect for * * * the institutions of the United States of America * * * and undivided allegiance to the government * * *'," found lacking in ascertainable standards in *Baggett*. *Id.* at 361, 84 S.Ct. at 1317.

Pursuant to this vague statute, defendants require applicants on the Questionnaire and Statement to answer these questions: "Do you believe in the principles underlying the form of government of the United States of America? Can you conscientiously, and do you, affirm that you are, without any mental reservation, *loyal to and ready to support the Constitution of the United States?*" The italicized words constitute the amended portion of this oath. This amendment was made just prior to the filing of these actions. This second question formerly read: "Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to the Government of the United States?" The first question was also amended to delete the requirement that the applicant write, in not less than 100 words, what he believes those principles underlying our form of government to be. These amendments, however, do not rescue these oaths from the stamp of unconstitutionality.

These questions are oaths for purposes of perjury under New York law. Under the law, oath includes an affirmation N.Y. Penal Law, McKinney's Consol. Laws, c. 40, § 210.00. When an applicant answers the second question in the affirmative he has unquestionably taken an oath. Moreover, applicants are warned that the statement is one made under oath. Consequently, when the applicant answers the first question, *supra,* and then swears or affirms at the end of the Questionnaire and Statement, as required, to the truth of his affirmative answer, the applicant has taken an oath to which the penalties for perjury attach, the same as in Whitehill v. Elkins, *supra,* and Elfbrandt v. Russell, *supra.*

If the oath required in Whitehill v. Elkins, *supra*, ("I m not engaged in one way or another in the attempt to verthrow the government of the United States") is constitutionally unacceptable for teachers because too vague nd broad when read in the light of the membership statute o which it was tied; and if the oath in Baggett v. Bullitt, *upra*, ("I will • • • promote respect for the flag and the nstitutions of the United States • • • and undivided allegiance to the government") cannot constitutionally be equired of teachers because it is also vague and broad; nd if the oath required of teachers in Cramp v. Board of Public Instruction, *supra* ("I have not and will not end my aid, support, advice, counsel or influence to the Communist Party") is likewise vague and broad; pursuant o what rationale shall lawyers be required to take the vague and broad oaths here? It has been suggested that here is none and that there is more reason for applying generous First Amendment standards in bar admission cases than in public employment cases.[24] The most important reason is that teachers, for example, are employees of the state while lawyers are employed by their clients to whom they owe their first obligation. This difference would seem to justify greater regulation of teachers than lawyers. Lawyers are officers of the court only in the sense that they are subject to the discipline of the court and are under an obligation not to hinder the administration of justice. Teachers and other public employees are employed directly by the state which thus has the added interest of an employer. The majority here holds that lawyers are in a special category and may, therefore, be required to take an oath such as those upheld as to "a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety." *Garner, supra*;

[24] *Id.* at 52.

Gerende, supra; American Communications Ass'n, *supra.* But the majority pointed out in Speiser v. Randall, *supra,* that in those cases there was no attempt directly to control speech, as in the instant case, but rather to protect, from some evil shown to be grave, some interest clearly within the sphere of governmental concern. What danger to the public is actually created by a "subversive" lawyer? Again, this question has been thoroughly examined.[25] The conclusion is that the danger is small and that, in any event, adequate remedies in the form of criminal penalties and disbarment already exist to punish and deter irresponsible conduct.

Finally, it seems clear that a determination as to the vagueness and broadness of these oath questions must be undertaken as a necessary requisite to any consideration of the obstruction by an applicant of the investigative process by refusing to answer these oath questions. cf. Whitehill v. Elkins, *supra.* Rule 9406's language, "loyal to such government" and the first question's language, "principles underlying the form of government" are certainly broad enough to encompass constitutionally protected dissent and protest activity against certain governmental policies and principles. There has been no attempt by statute, rule, regulation, or court decision to enlighten anyone as to what utterances or what activities may be construed as disloyalty to our government or contrary to the principles underlying our form of government. Clearly, law students who dissent from this government's policies with respect to the war in Vietnam have a ground for concern as to whether they are loyal to the government. "It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on 'those with a conscience and scrupulous regard for such undertakings.'" *Keyishian, supra,* 385 U.S. at 599, 87 S.Ct. at 681.

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[25] *Id.* at 40.

As to the oaths embodied in the two questions, defendants argue that examination of the New York statutory scheme discloses that both the Legislature and the Court of Appeals treat members of the bar as officers of the courts who, as such, are required to take the constitutional oath of office. Accordingly, say defendants, the requirements of C.P.L.R. 9406, that a person shall not be admitted to the bar unless he furnishes "satisfactory proof to the effect that he believes in the form of government of the United States and is loyal to such government" must be construed in harmony with its purpose, i.e., to test merely that the applicant, if approved, can truly and honestly take the constitutional oath of office. Thus, defendants plead, C.P.L.R. 9406 may not be deemed to be either vague or unconstitutional; it merely requires, in substance, that a law officer-to-be affirm that he believes in and is loyal to our constitutional form of government the same as any judge or other state officer.

In reply, plaintiffs' points are exceedingly apt. First, there is no attack made here upon the requirement that every person upon being admitted to the bar take the promissory oath given to all state officers to support the state and federal constitutions which is required by the New York Constitution, Article XIII, § 1. New York Judiciary Law § 466.[26]

Secondly, plaintiffs say that the attempt to save these vague oaths as to belief by assimilation with the constitutional oath of office cannot succeed. The fact is that the authority to prescribe these oaths derives from C.P.L.R. 9406 which is a statutory prerequiste for admission to the

[26] "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ....., according to the best of my ability." N.Y.Const., Art. XIII, § 1.

bar and, consequently, must be considered with reference thereto and not with reference to the Constitutional oath already required of lawyers and to which plaintiffs do not object. Even if we accept defendants' contention that C.P.L.R. 9406 and these oaths must be construed in light of the constitutional oath, as the Court said in Whitehill v. Elkins, *supra*, 389 U.S. at 61-62, 88 S.Ct. at 187 the statute and these oaths are still "befogged". We find here, as the Court found there, "an overbreadth [discussed supra] that makes possible oppressive or capricious application" as character committee personnel and appellate division justices change. That very threat may deter the unfettered exercise of First Amendment freedoms by law students as much as successive suits for perjury. This statute and these oaths are just another classic example of the often cited need for legislation drawn with precision in this sensitive and important First Amendment area. cf. Whitehill v. Elkins, *supra*.

The distinction between promissory oath and test oath of the kind here involved was recognized long ago. Ex parte Garland, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866). The oaths involved here are not promissory oaths to support the Constitution of the State and the United States as in the case of the constitutional oath. The fact that these oaths are in the form of "yes" and "no" questions is of special significance. If the applicant does not give the desired answer, which in this case is "yes", he may be questioned further, delayed in his admission, or disqualified without further questioning. He is warned of this on the front of the Questionnaire and Statement. In short, he must carry the burden of proof that he is qualified for admission. These oaths are not simply a promise to support the Constitution. These are oaths which require an applicant to disclaim past or present constitutionally protected political beliefs or activities. It is for this reason, i.e.,

that these oaths are too vague and too broad, that they cannot be equated with the constitutional oath.

Finally, plaintiffs "strike home" with another gem out of their storehouse of recent precedent, Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). There the state had claimed, as here, the right to examine the officer-to-be to test his sincerity and ability to take the constitutional oath there prescribed. The Court ruled in response to this claim in the *Bond* case, at 132, 87 S.Ct. at 347, that such a power could not be conceded because of its obvious susceptibility to abuse which it went on to demonstrate. Again, the Court made clear that there must be some specific evidence of the prospective officer's inability to take the oath before any such inquiry becomes proper. It simply cannot be done in every case.

Motion for Rehearing

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

Upon the annexed affidavit of Leonard B. Boudin, sworn to the 13th day of March, 1969, let the defendants show cause before this Court on the 21st day of March, 1969, at 4:00 o'clock, in the Court of Appeals Court Room of the United States Courthouse, Foley Square, New York, New York, why an order should not be made in the above-entitled matter: Granting rehearing of the plaintiffs' motions herein; and upon such rehearing, entering an order:

1. Dismissing the complaints insofar as they allege the unconstitutionality on their face of §90(1)(a) of the New York Judiciary Law and Rules 9401, 9404 and 9406(1) of Art. 94 of the Civil Practice Law and Rules;

2. Denying in part plaintiffs' motions and granting defendants' motions for summary judgment insofar as they pertain to the challenged statutes;

3. Denying in part plaintiffs' motions for preliminary injunctions against the enforcement of the above specified statutes and of all the practices and regulations of the defendants complained of;

4. Reducing the time limitations set forth in this court's opinion filed on February 17, 1969; and

5. For such other and further relief as the court may deem just and proper.

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Sufficient cause having been shown, let service of this order upon the attorneys for the defendants on or before 5 o'clock P.M., March 17, 1969, be deemed sufficient.

Dated: New York, N. Y.
March 14, 1969.

/s/ Constance Baker Motley
U.S. Circuit Judge

Affidavit of Leonard B. Boudin in Support of Motion for Rehearing

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEONARD B. BOUDIN, being duly sworn, deposes and says:

1. I am the attorney for the plaintiffs Stephen Martin Wexler, *et al.*, in 68 Civ. 2938 and make this motion on behalf of the plaintiffs in this action and in the companion action, 68 Civ. 2917.

2. On February 17, 1969, this Court ordered the two cases consolidated and rendered its decision on the merits of the plaintiffs' complaints. It upheld against constitutional attack the validity of §90(1)(a) of the New York Judiciary Law and Rules 9401, 9404 and 9406(1) of Art. 94 of the Civil Practice Law and Rules; District Judge Motley concurring in part and dissenting in part, rendered a separate opinion to the effect that Rule 9406(1) was unconstitutional on its face, and that the other Rules of Art. 94 and §90(1)(a) of the Judiciary Law were unconstitutional as implemented and applied by the defendants.

3. This Court also held that certain practices of the defendants were in violation of the constitutional rights of the plaintiffs and the class of individuals they represented. These practices related specifically to certain interrogatories and oaths used on the questionnaires issued by the defendant Committees on Character and Fitness and approved by the defendant

Appellate Divisions, and the opinions make it clear that oral interrogation along the same lines would be equally improper.

4. On consideration of the appropriate relief, the Court ruled that the plaintiff-applicants could submit to the admission process and fill out the questionnaires in a manner consistent with the guidelines established by the Court's opinion. If the applicants then faced any obstacles they could apply to this Court for further relief.

The Court then ruled that it would:

> "Hold all motions until such date not later than 90 days from the entry of this opinion, when counsel for the defendants shall report in writing what action, if any, the Appellate Divisions have taken. Such report shall be served upon plaintiffs' counsel; within 20 days thereafter it may if so advised, serve and file appropriate papers with respect to what further relief, if any, they deem required; the defendants shall answer within 15 days."

The Court also provided that "[i]f counsel desire an opportunity for further argument, we will assign a date."

The Court has, in effect, denied preliminary injunctive relief for the 90-day period at least, in the interest of comity and in expectation of the defendants' willingness to comply with the Court's rulings. Even as to the law student-plaintiffs, the Court held that preliminary relief would be unnecessary and no "serious chill during this brief interval" will occur because the "ultimate result is so clear."

5. The delay in signing an appealable order in this case deprives the plaintiffs and particularly the plaintiff-applicants of their right to an adequate appeal and ultimately to the earliest possible admission to the New York Bar.

Some of the plaintiff-applicants, for example, are not prepared to fill out the questionnaires and submit to the admission process declining only to answer the questions deemed improper by this Court. Since their principal claim has not been resolved in their favor, namely, that the statutes permit an unwarranted invasion of their political and personal privacy, the plaintiff-applicants do not believe that their First Amendment rights have been or can be fully protected by this Court's decision.

6. We, therefore, respectfully request that this Court sign an order (i) denying in part plaintiffs' motion and granting in part defendants' motion for summary judgment with respect to the challenged statutes and (ii) denying in part plaintiffs' motions for preliminary injunction respecting the challenged statutes and practices involved here.

7. Such an order is not in conflict with the intentions of this Court expressed in its opinion. It will permit the necessary retention of jurisdiction to supervise the revision of the defendants' practices and will protect those plaintiff-applicants who might submit to the admission process.

Such an order will also protect the interests of those plaintiffs who wish to take an early appeal.

8. With respect to the Court's action in deferring an order from the motions herein for at least 90 days, it is submitted that there should be a marked reduction of time periods indicated. This Court's decision modified or eliminated only a few questions on the questionnaires and in doing so it has set specific guidelines as to what the defendants must do in order to align their practices with the requirements of the Constitution. A decision by the defendants as to whether they will

comply with this aspect of the Court's opinion should have been made by this time; as this Court said in view of the defendants' expressed willingness to comply "the ultimate result is . . . clear".

Defendants have already had three weeks in which to act upon this Court's opinion. Under the circumstances, it seems to us that the Court's order should be modified so as to give the defendants 40 days from the decision of this Court and to provide for a response by the plaintiffs within 5 days thereafter, and a further answer by the defendants within 5 days.

There is no reason to withhold the order of this Court until the defendants indicate whether they will voluntarily comply for, as indicated, the relief granted by this Court is insufficient from the point of view of the plaintiffs. They intend to appeal to the Supreme Court even if there should be compliance by the defendants. There is, therefore, substantial reason why an order should be entered by this Court granting the relief sought by the plaintiffs to the extent that this Court has determined that it should be granted and denying the relief to the extent that the Court has so ruled. If this is done, the plaintiffs intend to appeal from so much of the order as denies them the relief sought.

9. No prior application for this order has been made by the plaintiffs.

10. This motion is brought on by order to show cause because the case was argued before a statutory court and the time and place of its meeting to consider this motion will have to be determined by the court.

/s/ Leonard B. Boudin

Affidavit of Leonard B. Boudin in Support of Motion for Rehearing
68 Civ. 2917; 68 Civ. 2938

Sworn to before me this
13th day of March, 1969

/s/ Jeanette Rosenfeld

JEANETTE ROSENFELD
Notary Public, State of New York
No. 31-3355935
Qualified in New York County
Commission Expires March 30, 1969

Defendants Report

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

SIRS:

PLEASE TAKE NOTICE that, pursuant to the opinion of this Court dated February 17, 1969, as modified by order of this Court dated March 21, 1969, the within Report was filed this day with the Clerk of the Court.

Dated: New York, N. Y.
May 14, 1969

Yours, etc.

LOUIS J. LEFKOWITZ
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State of New York

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By /s/ Daniel M. Cohen
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To:

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Defendants Report

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

TO THE HONORABLE HENRY J. FRIENDLY, CIRCUIT JUDGE; DUDLEY B. BONSAL AND CONSTANCE B. MOTLEY, DISTRICT JUDGES:

The decision of this Court filed February 17, 1969, as modified on March 21, 1969, instructed counsel for the defendants to submit a report to this Court by May 15, 1969 setting forth the steps taken by the Appellate Divisions and their respective Committees on Character and Fitness to meet the objections noted in this Court's opinion. This report is submitted pursuant to the Court's direction.

The Appellate Divisions and their Committees have reviewed not only the particular questions found defective, but also have reviewed other matters raised in the pleadings and at argument which might appropriately be considered in the formulation of a judgment. This review was carried out, however, without any communication from plaintiffs' counsel, although we understood that suggestions would be forthcoming from them.

Questions 26, 27(a) and 31.

This Court's opinion found three questions in the Form of Questionnaire troublesome, and these have been revised to meet the objections noted by the Court.

Question 31 (renumbered as Question 30 in the Second Department) concerned incidents in the applicant's life not disclosed by other questions. This question has been deleted from the Questionnaire.

Defendants Report
68 Civ. 2917; 68 Civ. 2938

Question 27(a) formerly asked whether the applicant believed "in the principles underlying the form of government of the United States", which this Court found vague. Defendants have taken the position that Question 27 deals only with the applicant's ability to take the constitutional oath prescribed for officers of the Court; consistent with that interpretation, Question 27(a) has been revised as follows:

> "Do you believe in the constitutional form of government of the United States of America?"

Question 26 dealt with membership or affiliation with organizations advocating the violent overthrow of the Government of the United States. This Court found the question defective in two respects: (1) The question, as phrased, did not make it clear that the advocacy of violent overthrow must have coincided with the applicant's membership, and (2) the question was not limited to "knowing" membership. These defects, we believe, have been cured in the revised question but the Appellate Divisions have not been content to merely meet the objections noted by the majority of this Court. Judge Motley's dissenting opinion noted, at p. 32, that admission to the Bar might well be denied to an applicant only if, in addition to knowing membership, he shared the "specific intent to further the unlawful aims of the organization". Question 26 has therefore been rephrased in two parts to meet the objections both of the majority of this Court and of Judge Motley, as follows:

> "26(a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be

overthrown or overturned by force, violence or any unlawful means? . . . . . If your answer is in the affirmative, state the facts below.

"(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?"

Other Matters

We understood that plaintiffs wished a review of the form of affidavits presently being utilized to establish the character and residency of applicants, and these forms of affidavits have been reviewed by the Appellate Divisions and their respective Committees. No change is presently planned for these forms of affidavit.

Finally, the plaintiffs belatedly challenged the practice, utilized in the Second Department, requiring an applicant to execute an authorization permitting the Committee on Character and Fitness to have access to the applicant's Selective Service file. Although this Court did not review that practice (see opinion, at fn. 9, p. ii), that practice has been reviewed by the Appellate Division, and has been, or shortly will be, discontinued.

Dated: New York, N.Y.
May 14, 1969

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

Defendants Report
68 Civ. 2917; 68 Civ. 2938

By /s/ Daniel M. Cohen
Assistant Attorney General
Attorney for Defendants

Of Counsel:
David W. Peck
Sullivan & Cromwell
48 Wall Street
New York, N.Y. 10005

Plaintiff's Response

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 69 Civ. 2938]

TO THE HONORABLE HENRY J. FRIENDLY, CIRCUIT JUDGE: DUDLEY B. BONSAL AND CONSTANCE B. MOTLEY, DISTRICT JUDGES:

The plaintiffs in 68 Civ. 2938 respond by their counsel to the report of the defendants dated May 14, 1969, as follows:

1. The defendants' rephrasing of question 26 is, in our opinion, insufficient to meet the objections raised by the plaintiffs and in Judge Motley's opinion. Assuming that any general question of that type were properly addressed to an applicant for admission to the bar, which is not conceded, question 26(a) and (b) would require a further rephrasing to read as follows:

> "Have you ever organized or helped to organize or become a member of any organization or group of persons which during the period of your membership or association you knew was advocating that the Government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force or violence and with respect to which during the said period of membership you had the specific intent to further the aims of such organization or group of persons to overthrow or overturn the Government of the United States or any state or any political subdivision thereof by force or violence."

2. Question 27(a) has been rephrased by the defendants in a manner which we still believe to present two constitutional

objections. The first is that the term "constitutional form of government" is impermissibly vague; the second is that any question addressed to belief is a violation of the First Amendment.

3. The report indicates that no change is presently planned for the affidavits presently being utilized to establish the character and residency of applicants. We find these affidavits objectionable with respect to the following questions: 6(b). "Persons with whom applicant lives (if known to affiant)"; 7. "Affiant's conclusions as to the applicant's moral character"; 8. "Facts upon which affiant's knowledge or opinion as to applicant's moral character is based."

4. The report of the defendants does not indicate that the Character Committees will refrain from making oral inquiries or investigations in the areas held constitutionally protected by this Court's decision. It is our view that the plaintiffs are entitled to protection from such oral interrogations and investigations.

5. We, of course, adhere to the position taken in our briefs and oral argument and to the views expressed in the opinion of Judge Motley, dated February 17, 1969. In any event, we submit that a declaration of the plaintiff's rights and provision for appropriate relief should be embodied in a judgment of this Court.

Dated: New York, N. Y.
May 20, 1969

Respectfully Submitted,

RABINOWITZ, BOUDIN & STANDARD
Attorneys for Plaintiffs
Stephen Wexler, *et al.* in
68 Civ. 2938
30 East 42nd Street
New York, New York 10017

CERTIFICATE OF SERVICE

I, Leonard B. Boudin, hereby certify that on this 20th day of May, 1969, I served by mail a copy of the within response upon each of the following: Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attention of Daniel M. Cohen, Esq., Assistant Attorney General, Attorney for Defendants, at 80 Center Street, New York, New York; David W. Peck, Esq., Sullivan & Cromwell, at 48 Wall Street, New York, N.Y. 10005; and Alan H. Levine, Esq., Attorney for Plaintiffs Law Students, *et al.*, at 156 Fifth Avenue, New York, N.Y. 10010.

/s/Leonard B. Boudin

Defendant's Reply

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

TO THE HONORABLE HENRY J. FRIENDLY, CIRCUIT JUDGE; DUDLEY B. BONSAL AND CONSTANCE B. MOTLEY, DISTRICT JUDGES:

Defendants, by their counsel, submit the following reply to plaintiffs' response dated May 20, 1969.

Plaintiffs have taken issue with the revised form of Question 26 of the Form of Questionnaire, and suggest that the two subdivisions of that question be incorporated in a single sentence. We submit that the form of question adopted by the Appellate Divisions is permissible, whereas the form proposed by plaintiffs is both vague and ungrammatical.

The defendant Courts and Committees see no need for further oral argument, although counsel are willing to present such argument if that is considered desirable by this Court. If the revisions set forth in our report of May 14, 1969 are considered sufficient to remedy the problems noted in this Court's opinion, counsel are prepared to submit a proposed judgment for the consideration of this Court.

Dated: New York, N.Y.
May 29, 1969

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By /s/ Daniel M. Cohen
Assistant Attorney General
Attorney for Defendants

Of Counsel:
David W. Peck
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48 Wall Street
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Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 2917

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs,

against

LOWELL WADMOND, *et al.*,
Defendants.

68 Civ. 2938

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs,

against

THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, First Judicial Department, *et al.*,
Defendants.

The plaintiffs in 68 Civ. 2917, Law Students Civil Rights Research Council, Inc., *et al.*, having commenced an action on their own behalf and, pursuant to Rule 23, F.R.C.P., on behalf of all others similarly situated, seeking declaratory and injunctive relief against the enforcement of Statutes and Rules of the State of New York delegating to the defendants Supreme Court of the State of New York, Appellate Division, First Judicial Department and the Com-

mittee on Character and Fitness appointed by it, the authority to examine and certify persons qualifying for admission to the Bar of the State of New York, and plaintiffs having challenged the application of such Statutes and Rules as embodied in the form of Questionnaires and oral interviews conducted by said Court and Committee, and plaintiffs Law Students Civil Rights Research Council, Inc., *et al.*, having moved for convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 and for a declaratory judgment and a preliminary and permanent injunction on the grounds that the New York Statutes and Rules, on their face and as applied, violated the plaintiffs' rights under the Fourteenth Amendment to the United States Constitution; and

Plaintiffs in 68 Civ. 2938, Stephen Martin Wexler, *et al.*, having commenced an action seeking declaratory and injunctive relief against the defendants Supreme Courts of the State of New York, Appellate Divisions, First and Second Judicial Departments and the Committees on Character and Fitness thereof, contending that the State Statutes and Rules empowering the defendant Courts and their Committees to establish procedures for applications for admission to the New York State Bar were vague and overbroad in violation to the Fourteenth Amendment, and that the New York Statutes and Rules as applied by the defendant Courts and Committees, in the written Questionnaires promulgated by them and in the personal interviews conducted of applicants, were unconstitutional as written and as applied; and said plaintiffs having moved for the convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 and for a preliminary injunction and declaratory judgment; and

Honorable Constance Baker Motley, District Judge, on September 25, 1968 having granted plaintiffs' separate motions to convene a three-judge court, and this Court

having convened for argument of the respective motions by plaintiffs on November 13, 1968, at which time the above actions were consolidated; and

Defendants having moved to dismiss the complaints on the grounds that this Court lacked jurisdiction over the persons of the defendants, and over the subject matter of these actions, and the defendants having contended that this three-judge court was not properly convened, and the defendants having moved to dismiss the complaints for failure to establish a claim under the United States Constitution or under Federal Law; and

This Court having rendered its opinion on February 17, 1969, holding that it did have jurisdiction to reach the merits of the claims asserted in the complaints, and holding further that the Statutes and Rules challenged in these actions were and are constitutional on their face but that certain questions then being utilized in the Questionnaires were inconsistent with the Fourteenth Amendment to the Constitution of the United States; and the defendants having been directed to file a report within ninety (90) days after the rendering of this Court's decision setting forth the steps taken to implement that decision; and the defendants having filed a report dated May 14, 1969, hereto annexed, setting forth changes which have been adopted in the form of Questionnaire; it is finally ORDERED, ADJUDGED AND DECREED (1) That this Court was properly convened and has jurisdiction over the subject matter of this action and over the persons of the defendants;

(2) That the New York State Statutes and Rules delegating power to the Supreme Courts, Appellate Divisions and their respective Committees on Character and Fitness to administer admissions to the New York Bar do not violate the Fourteenth Amendment to the United States Constitution on their face;

(3) That Question 27(a) as revised in said report dated May 14, 1969, be further revised to read as follows:

> "Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain."

(4) That the motions of plaintiffs and defendants are granted to the extent herein provided and are otherwise denied;

(5) That no party shall recover costs against any other; and

(6) That this decree is without prejudice to any new action relating to the manner in which the aforesaid procedures are carried out.

Dated: New York, New York
June 16, 1969

HENRY J. FRIENDLY
U.S.C.J.

DUDLEY B. BONSAL
U.S. D.J.

While dissenting in certain respects from the court's opinion, I sign the decree as properly carrying it out.

CONSTANCE BAKER MOTLEY
U.S. D.J.

Filed:
June , 1969

.....
Clerk

Notice of Appeal

UNITED STATES DISTRICT COURT
Southern District of New York

[Same Title, 68 Civ. 2917; 68 Civ. 2938]

Notice is hereby given that LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., TOBY B. GOLICK, JAMES C. MAURO, JR., WILLIAM H. B. RODARMOR, STEPHEN MARTIN WEXLER, H. GABRIEL KAIMOWITZ, ROBERT M. COVER, THE COLUMBIA LAW STUDENTS GUILD and NEW YORK CITY CHAPTER OF NATIONAL LAWYERS GUILD, the above named plaintiffs, hereby appeal to the Supreme Court of the United States from the final judgment entered in this case on June 16, 1969, insofar as said judgment partially denies plaintiffs' motions for declaratory and injunctive relief and partially grants the defendants' motion to dismiss the complaints.

This appeal is taken pursuant to 28 U.S.C. §1253. Dated, August 7, 1969.

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Notice of Appeal
68 Civ. 2917; 68 Civ. 2938

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FILE COPY

Supreme Court of the United States

October Term, 1969

Office-Supreme Court, U.S.
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No. ~~696~~ 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

October Term, 1969

No

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,

Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,

Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,

Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants in the above-entitled consolidated cases, Law Students Civil Rights Research Council, Inc., Toby B. Golick, James C. Mauro, Jr., William H. B. Rodarmor, Stephen Martin Wexler, H. Gabriel Kaimowitz, Robert M. Cover, The Columbia Law Students Guild and The New York City Chapter of the National Lawyers Guild, having

appealed from a final judgment of a three-judge statutory court of the Southern District of New York entered on June 16, 1969 partially dismissing their complaints and partially denying their motions for injunctive and declaratory relief, submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of District Judge Motley convening the three-judge statutory court is reported at 291 F. Supp. 772 and is appended, *infra*, pp. 5a-13a. The majority opinion of the three-judge statutory court is reported at 299 F. Supp. 117 and is appended, *infra*, pp. 14a-40a and the partially concurring and partially dissenting opinion of Judge Motley is reported at 299 F. Supp. 133 and is appended, *infra*, pp. 40a-78a.

Jurisdiction

Appellants are three law students (Golick, Mauro and Rodarmor), three applicants to the New York Bar who are certified as having passed their bar examinations (Wexler, Kaimowitz and Cover), two organizations composed largely of law students and a third organization which is a New York City bar association.

Appellants filed their complaints in the Southern District of New York alleging that certain statutes and statewide judicial rules governing admission to the New York Bar, namely §90(1) of the New York Judiciary Law, Rules 9401, 9404 and 9406 of the New York Civil Practice Law and Rules, and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-Law, contained in the New York Judiciary Law Appendix,[1] and their application through question-

[1] These statutes and judicial rules are reprinted in Appendix A, *infra*, pp. 1a-4a.

naires, regulations and practices instituted and administered by the appellees violate appellants' constitutional guarantees of personal privacy and freedom of speech, belief and association.

Appellants sought, pursuant to 42 U.S.C. § 1983, to enjoin the appellees from enforcing the statutes and judicial rules and from continuing to administer them by specified questionnaires, regulations and practices or by any means which contravene appellants' constitutional rights.

A three-judge statutory court was convened by District Judge Motley pursuant to 28 U.S.C. §§2281 and 2284. The cases were subsequently consolidated for hearing and decision by the statutory court.

On February 17, 1969, the statutory court, consisting of Circuit Judge Friendly and District Judges Bonsal and Motley rendered its decision partially dismissing the complaints and partially denying appellants' motions for a preliminary injunction, summary judgment and declaratory relief.

The majority below in an opinion written by Judge Friendly, ruled that the challenged statutes and judicial rules were constitutional on their face and that in large measure they were, except for a few of the appellees' regulations and practices, constitutional as applied. Judge Motley agreed with the majority that §90(1)(a) of the Judiciary Law was constitutional on its face but disagreed with the balance of the majority opinion. Final judgment embodying the court's determinations was entered on June 16, 1969 and is appended *infra*, pp. 79a-82a. A consolidated notice of appeal from this judgment was filed with the Clerk of the Southern District of New York by appellants on August 8, 1969.

Jurisdiction of this appeal is conferred by 28 U.S.C. §1253. The following cases sustain the Court's jurisdiction: *Schneider* v. *Smith*, 390 U.S. 17; *Zemel* v. *Rusk*, 381 U.S. 1; *Dombrowski* v. *Pfister*, 380 U.S. 479; *Baggett* v. *Bullitt*, 377 U.S. 360; *Shelton* v. *Tucker*, 364 U.S. 479.

Statutes Involved

The constitutional validity of New York Judiciary Law §90(1)(a) (hereinafter "Jud.L."), New York Civil Practice Law and Rules, Art. 94, Rules 9401, 9404 and 9406(1) (hereinafter "CPLR") and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-Law contained in Jud. L. Appendix (hereinafter "Rule VIII") is here involved. The texts of these statutes and of Rule VIII are fully set forth in Appendix A, *infra*, pp. 1a-4a.

Questions Presented

Are applicants and prospective applicants to the New York Bar denied the freedom and privacy of their political and personal speech, beliefs, associations and activities and, further, are a class of their prospective clients, i.e., litigants who seek to redress deprivation of federal rights denied adequate and effective assistance of counsel and free access to federal and state courts by Jud. L. §90(1)(a), CPLR 9401, 9404, and 9406 and Rule VIII

(1) because, on their face, they establish an impermissibly vague and overbroad political test for admission to the Bar;

(2) because they impose upon every applicant for admission the burden of proving that (a) he believes in the form of government of the United States, and (b) is loyal to such government;

(3) because, under the threat of a perjury prosecution or delay in or disqualification from admission, they compel every applicant to submit to unlimited and indiscriminate personal and political interrogation without an adequate foundation or probable cause first having been established on the record; and

(4) because, as applied through questionnaires and other practices, they constitute an unconstitutionally broad, vague and indiscriminate inquiry into the personal and political life of each applicant.

Statement of the Case

Applicants to the New York Bar, as a prerequisite for admission, must submit to a political and personal screening process established by the above-mentioned statutes and judicial rules and administered by appellees.

Under Jud. L. § 90(1)(a) the appellee courts (hereinafter "Appellate Divisions") have the sole power to grant applications made in their respective jurisdictions for admission to the New York Bar.[2] Before granting admission, the Appellate Divisions must be satisfied that the applicant has proven that he "possesses the character and general fitness requisite for an attorney and counsellor-at-law [Jud. L. § 90(1)(a)] and "*believes in* the *form* of government of the United States and is *loyal* to such government" [CPLR 9406]. (Italics supplied).

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[2] The State of New York is divided into four judicial departments. N.Y. Const. Art. 6, § 4; Jud. L. §70. Admission in the department of residence is, as the Court below stated, "the key to lawful practice throughout the State", *infra*, p. 29a, since it authorizes practice before the New York Supreme Court sitting in any department and before the New York Court of Appeals.

In 1968, 1,522 applicants were admitted in the First and Second Judicial Departments comprising approximately 70 percent of the total admissions for that year throughout the State.

To enable the Appellate Divisions to carry out their responsibility, CPLR 9401 and 9404 authorize the appointment of the appellee Committees on Character and Fitness (hereinafter "Committees") . These Committees are delegated broad investigatory powers and the key adjudicatory role in determining the qualifications of applicants for admission under the New York scheme. See Rule VIII-1; CPLR 9401, 9404, 9406.[3]

CPLR 9404 provides that "unless otherwise ordered by the Appellate Division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission."[3a] CPLR 9406(1) also directs the committees, like the Appellate Divisions, to withhold favorable action unless the applicant has furnished satisfactory proof that he believes in the form of and is loyal to the government of the United States.

The Committees' investigatory process, insofar as the complaints are concerned, involves three principal methods of inquiry: questionnaire, personal interview and third party "home life" affidavits.[4]

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[3] See also *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 104 discussing Rule 1(d) of the New York Rules of Civil Practice presently embodied in CPLR 9404, and where the Court concluded that "the role of the Committee is more than that of a mere investigator."

[3a] Under CPLR 9406, the Committees are charged, independently of the Appellate Divisions, with the duty of determining the applicant's political and other qualifications for receiving a certificate of admission.

[4] During the course of the litigation in the court below, the appellees narrowed somewhat the scope of the questionnaires and affidavits. However, at no time did appellees disclaim or deny either the validity or existence of the authority to reexpand the scope of inquiry. Nor did appellees give the court below any affirmative assurance that such an expansion would not occur. For

CPLR 9404 authorizes the committees, subject to the approval of the justices of the Appellate Division, "to prescribe and from time to time amend a form of statement or questionnaire on which the applicants shall set forth all the information and data required by the committee."[5]

The questionnaires in both Departments have customarily included broad inquiries into the applicant's associations, beliefs and activities.

Just prior to the commencement of these suits on June 16 and 17, 1968, the Appellate Divisions prepared a revised questionnaire which narrowed or eliminated some of the challenged interrogatories. Although the First Department had apparently distributed the revised questionnaires before these suits were filed, the Secretary of the Second Department's Committee stated in an affidavit dated November 12, 1968 that the revised questionnaires were only "now being distributed to applicants." See R. Doc. No. 17 [6] and *infra*, pp. 48a-49a. Despite the Second Department's delay and the fact that three other challenged inter-

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this reason and also because the appellants had already suffered irreparable injury as a consequence of the practices by the time they had been discontinued, we believe it is appropriate to present these challenged interrogatories and other practices which were in effect in the First and/or the Second Departments at the time the complaints were filed to demonstrate the scope of appellees' investigatory authorization.

Judge Motley illustrates the revisions that have been made in the challenged interrogatories and practices during the course of litigation. See *infra*, pp. 43a-47a, 49a-54a.

[5] Complete disclosure is absolutely required. Sanctions for failure "fully and accurately to disclose any fact or information called for by any question" are indicated by express warnings on the questionnaire that all answers are given under oath (and are thereby subject to the perjury provisions of N.Y. Penal Law § 210.00) and that such failure may result in denial or revocation of admission. See *infra*, pp. 37a, 48a, 73a.

[6] "R. Doc. No." refers to the enumerated documents which constitute the original record of the proceedings below filed with the Clerk of this Court.

rogatories were not deleted from the revised questionnaires by either Department until November 7, 1968,[7] the majority below decided the constitutional validity only of those interrogatories which remained in effect at the time of oral argument on November 13, 1968.[8] These interrogatories read as follows:

> 26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> 27(a). Do you believe in the principles underlying the form of government of the United States of America?
>
> (b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?
>
> 31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is "Yes", state the facts.
>
> 32(a). Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?
>
> (b) Will you conscientiously endeavor to conform your professional conduct to them?

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[7] See *infra*, pp. 32a and n. 6, 54a.

[8] See *infra*, pp. 32a-33a, 37a-38a, 39a n. 9.

Applicants are also required to obtain and submit to the Committees third-party affidavits relating personal observations of the applicant's "home life." See Jud. L. § 90 (1)(a) and Rule VIII-1. The forms for these affidavits were revised after commencement of these suits.[9] See *infra*, pp. 45a, 58a.

After submitting the questionnaire and third-party affidavits, each applicant is scheduled for a personal interview with a member of the Committee having jurisdiction over his application. The purpose of this interview is to explore areas of inquiry disclosed by the questionnaires, affidavits or other information independently obtained by the Committee. *Infra*, pp. 54a-55a.

Appellants instituted these actions for declaratory and injunctive relief, alleging that the political and personal screening process for admission to the New York Bar violated the rights of applicants and law students to the privacy of their associations, beliefs, speech and activities and to the exercise of these First Amendment guarantees free from penalizing or inhibiting regulation. Appellants also contended that the admission process has the further impermissible effect of culling out prospective attorneys having "controversial" political and social views with the result that a class of unpopular, segregated or poor litigants is deprived of effective and sympathetic assistance of counsel and free access to federal and state courts.

The court below rendered its decision on February 17, 1969 with Judge Motley concurring in part and dissenting in part. Final judgment was entered on June 16, 1969, partially granting the defendants' motion to dismiss the complaints and partially denying plaintiffs' motions for summary judgment and injunctive and declaratory relief.

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[9] Pertinent portions of the original and revised affidavit forms are set forth in Judge Motley's opinion, *infra*, pp. 43a-47a.

The majority ruled that Jud. L. § 90(1)(a), CPLR 9401, 9404 and 9406 and Rule VIII were constitutional on their face. Appellants' challenge to these provisions as applied was also rejected by the majority except as to Questions 26, 27(a) and 31, see *infra* at pp. 33a-37a.

The court ruled that Question 26 (*supra*, p. 8) should be limited to membership which coincides with organizational teaching or advocacy and "to cases where the applicant knew of the teaching or advocacy." *Infra*, p. 36a.[10]

In compliance with the court's order, the appellees offered to change Question 26 to read as follows:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> (b). If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?"[11]

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[10] The court below deferred final judgment for 90 days to permit the appellees time to evaluate their practices and report back to the court on the steps they would take to conform their practices with constitutional requirements. *Infra*, pp. 39a-40a.

Appellees filed their proposals on May 15, 1969 (R. Doc. No. 24). Appellants filed their opposition to these proposals on May 21, 1969 (R. Doc. No. 25).

[11] See R. Doc. No. 24. The court below made no mention in its judgment of whether it accepted or rejected appellees' revision of Question 26.

Question 27(a) (*supra*, p. 8) was found impermissibly vague. See *infra*, p. 33a. In the judgment (*infra*, p. 82a), the Court ordered that the question be reworded as follows:

> "27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain." [12]

As for Question 31 (*supra*, p. 8) the majority held that it constituted a "catch-all" which had a "serious *in terrorem* effect." *Infra*, p. 37a. The court found "no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life." *Ibid.*

The Questions Presented Are Substantial

1. Profoundly important questions are raised by this appeal regarding the power of the state to institute a screening program for admission to the bar which compels applicants to make unlimited disclosures of their political and personal associations, beliefs, speech and activities and which predicates disqualification upon the lawful exercise of First Amendment rights.

Screening programs similar to New York's are in operation in every state and in some federal jurisdictions.[13]

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[12] The court rejected appellees' proposed rewording (R. Doc. No. 24): "Do you believe in the constitutional form of government of the United States of America?"

[13] Two cases involving such screening programs are presently before this Court. See *Baird* v. *State Bar of Arizona, cert. granted* 394 U.S. 957 and *Application of Stolar*, No. 75 O.T. 1969, petition for certiorari pending, 38 U.S.L.W. 3002.

See generally Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953); Countryman & Finman,

These programs have incorporated the worst features of the loyalty-security programs prevalent during the so-called McCarthy period.[14]

This is the first case in the area of bar admissions to present a broad challenge to such screening programs, which in almost every other area of public benefits, licensing and employment have been sharply curtailed by the judiciary under this Court's leadership in recent years.[15]

More, however, is at stake in this case than the liberties and privacy of individuals. The Bar is imbued with an overriding national interest regarding the maintenance of its independence and for that reason it is a particularly unsuitable area in which to experiment with First Amendment freedoms.[16] Screening programs, such as New York's,

The Lawyer and Modern Society, 758, 822-884 (1966); Ginger & Koenigsberg, *Report on Rules for Admission to the Bar; Tests of Applicants' "Loyalty" and "Good Moral Character"*, 18 Law. Guild Rev. 58 (1958); 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*, 262-283 (1967); Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights 33 (1967-1968).

[14] See *In re Summers*, 325 U.S. 561; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Konigsberg* v. *State Bar*, 353 U.S. 252; *Konigsberg* v. *State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82; *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954) *rev'd* 348 U.S. 978; *Application of Patterson*, 302 P. 2d 227 (Ore. 1956); *Application of Levine*, 397 P. 2d 205 (Ariz. 1964); and generally Brown & Fassett, *supra;* Countryman & Finman, *supra; New York State Bar Assoc. Rept. of the Special Comm. on the Future Admission to Membership in the New York Bar of Persons of Doubtful Loyalty and the Continuation in Good Standing of Present Members Whose Loyalty is in Doubt* (Jan. 24, 1954), 68 Assoc. of the Bar of the City of New York, Pam. No. 17.

[15] See *e.g., Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Sherbert* v. *Verner*, 374 U.S. 398; *Kent* v. *Dulles*, 357 U.S. 116.

[16] See *NAACP* v. *Button*, 371 U.S. 415; *Konigsberg* v. *State*, 353 U.S. 252, 273; *Sanders* v. *Russell*, 401 F. 2d 241 (5th Cir. 1968). *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280, 285, 286-287 (5th Cir. 1964); *Sobell* v. *Perez*, 289 F. Supp. 392, 399 (D. La. 1968).

directly threaten the independence of the Bar, state and federal, by inhibiting attorneys and prospective attorneys from associating with and representing unpopular groups or causes.[17]

Perhaps the broadest and most serious public and private consequences of these programs is their effect on the ability of minority and dissident groups to obtain vindication of federal rights in the courts. Moreover, in a particular sense these groups are also denied their rights to freedom of speech and association since their litigation is not solely an assertion of legal right, but, as this Court has recognized, frequently a mode of expressing their social and political beliefs. See *NAACP* v. *Button, supra* at 428-429, 431, 444-445; *Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217; *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; Symposium, *The Right to Counsel and the "Unpopular Cause"*, 20 U. Pitt. L. Rev. 725 (1959).

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[17] See *NAACP* v. *Button, supra* at 430-438, 443-445; *Hacken* v. *Arizona*, 389 U.S. 143, 146, appeal dismissed (Mr. Justice Douglas dissenting); *Konigsberg* v. *State Bar*, 366 U.S. 36, 73-74 *and In re Anastaplo, supra* at 115-116 (Mr. Justice Black with whom Chief Justice Warren and Mr. Justice Douglas concur, dissenting); Pollitt, *Counsel for The Unpopular Cause*, 43 N.C.L. Rev. 9 (1964); Chafee, *Blessings of Liberty*, 157-176 (1956); *Loyalty Oaths for Lawyers*, Comm. on Law Reform, Assoc. of the Bar City of N.Y., 103 Reports No. 1017A (1950). See also Brief of the Attorney General of the United States as Plaintiff-Intervenor in *Sobell* v. *Perez, supra.*

The role played by law students in civil rights and civil liberties litigation, through the appellant organizations and otherwise, should be emphasized in calculating the impact of the New York program on the availability of counsel in these areas of law. Because of a shortage of lawyers, adequate assistance of counsel for poor persons, prisoners or the racially or politically oppressed, has come to depend directly on the services of law students. See generally *Johnson* v. *Avery*, 393 U.S. 483, 489 and n. 9, and 491 (Mr. Justice Douglas, concurring); *Hacken* v. *Arizona, supra;* Roberts, *Social Crisis and the Lawyer and Law Student: An Essential Meeting*, Villanova L. Rev. (Spring 1969).

2. In our view the First Amendment immunizes political beliefs, speech and association from inquisition or punishment by any agency government. See *Schneider* v. *Smith*, 390 U.S 17, 25.

Even if New York had an arguable, though in any event a remote, interest in excluding "disloyal" citizens from the practice of law, the destructive effect on personal and public interests noted above, particularly in the area of First Amendment freedoms, compels the state to choose a "less restrictive alternative" than the course followed here. See *Stanley* v. *Georgia*, 394 U.S. 557, 566-567; *United States* v. *Spock*, — F. 2d — (1st Cir., decided July 11, 1969) [slip opinion at p. 4, n. 5 (majority) and pp. 46-49 (Coffin, J., dissenting)]; and *infra*, p. 75a (Motley, J.).

Moreover, assuming that admission screening programs are ever proper, the New York scheme constitutes a direct violation of the principle announced by this Court in *NAACP* v. *Button*, 371, U.S. 415, 438 that

> "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms"

and reaffirmed many times, see *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512, 513; *United States* v. *Robel*, 389 U.S. 258, 265; *Keyishian* v. *Board of Regents*, *supra* at 603-604.

The decision of the majority sanctioning New York's screening program is an unprecedented departure from the rule of "precision" in three major respects: (A) it permits New York to impose a vague and overbroad political test for admission, (B) it allows New York to place the burden of proving loyalty upon the applicant, and (C) it warrants New York to conduct an unlimited and indiscriminate search into the personal and political life of each applicant without probable cause.

A. *New York's Political Tests for Admission are Vague and Overboard.*

The substantive political tests for admission embodied in Jud. L. § 90(1)(a) and Rule VIII: "good moral character and general fitness" and in CPLR 9406(1): "believes in the form of government of the United States and is loyal to such government" are impermissibly vague and overboard.

a. Section 90(1)(a) and Rule VIII, in erecting a standard for judging political [18] as opposed to other characteristics of the applicant, "is wholly lacking in 'terms susceptible of objective measurement'." *Keyishian* v. *Board of Regents, supra,* at 604. This Court found in *Konigsberg* v. *State Bar,* 353 U.S. 252, 263, that the term "good moral character" is an "unusually ambiguous" and "vague qualification, which is easily adapted to fit personal views and predilections, [and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." The mere existence of such license is constitutionally intolerable in the area of free expression where the "standards for permissible statutory vagueness are strict." *NAACP* v. *Button, supra* at 432, 433; *Baggett* v. *Bullitt,* 377 U.S. 360, 374; *Speiser* v. *Randall,* 357 U.S. 513, 526.

In upholding § 90(1)(a) and Rule VIII against charges of vagueness the majority below relied upon the statement in the second *Konigsberg* case that the term "good moral character" could not "well be drawn in question" 366 U.S. at 40-41. *Infra,* p. 22a. But this Court noted there that the "good moral character" qualification had not been challenged by the applicant. 366 U.S. at 41. Moreover, as Judge Motley correctly points out, the quarrel here is over

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[18] See *Application of Cassidy,* 268 App. Div. 282, 51 N.Y.S. 2d 202 (2nd Dept. 1944) *aff'd without opinion* 296 N.Y. 926, 73 N.E. 2d 41 (1945) disqualifying an applicant for political unfitness under § 90(1)(a). See also Brown & Fasset, *supra* at p. 496.

the term "good moral character and general fitness" as a political test and not as a standard for trustworthiness or for other characteristics traditionally associated with professional ethics. *Infra*, pp. 62a-63a. See also *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 263-264 (Mr. Justice Frankfurter, concurring); *Hallinan* v. *Committee of Bar Examiners*, 421 P. 2d 76, 80-81 (Cal. 1966).

b. Equally vague are the terms of CPLR 9406(1): "form of government of the United States" and "loyal to such government." As Judge Motley demonstrated, this Court has found similar terms to be unconstitutionally vague in *Keyishian* v. *Board of Regents, supra* at 593 ("utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act"); and in *Baggett* v. *Bullitt*, 377 U.S. 360, 361, 371-372 ("respect for the flag and institutions of the United States . . . and undivided allegiance to the government of the United States"). See *infra*, p. 72a.

The restraints imposed by CPLR 9406(1) upon conscientious applicants are obvious. Applicants must speculate at their peril—perjury prosecution or delay, denial or, as a result of the continuing surveillance to which they are subjected, revocation of admission—as to the meaning of "form of government" and the nature of belief and loyalty thereto which CPLR 9406(1) requires them to possess.

In contrast to its ruling that CPLR 9406(1) was not unconstitutionally vague, the majority below reaches a contrary conclusion regarding an almost identically phrased oath, Question 27(a): "Do you believe in the principles underlying the form of government of the United States of America?" See *infra*, pp. 33a-34a.[19] The apparent distinction between the oath and CPLR 9406(1), at least as the majority saw it, was the presence of the word "principles" in the former and its absence in the latter.

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[19] Brown & Fassett, *supra* at 490-491 indicate that CPLR 9406(1) "is the basis for" Question 27(a).

Exclusion of the word "principles" makes CPLR 9406(1) no more constitutional than the oath. Furthermore, CPLR 9406(1) poses no less a danger to First Amendment rights than does the oath. It is a political test, which the applicant must meet, not merely by a single affirmation, but by undefined and unlimited evidentiary proof.

c. CPLR 9406(1) also suffers from impermissible overbreadth in two principal respects.

First, it explicitly conditions the Committee's certificate and the Appellate Division's final order for admission solely upon an applicant's political beliefs. New York has therefore chosen to tread heavily into a zone of privacy absolutely reserved to the individual. The decision below stands in direct conflict with the principle reaffirmed in *Stanley* v. *Georgia, supra,* of the inviolable sanctity of a "person's private thoughts", *id.* at 566. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565. *Stanley* expressly adopted Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438, 478, that the "makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." See also *Schneider* v. *Smith, supra* at 25; *Thomas* v. *Collins,* 323 U.S. 516, 531; *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304; *West Virginia* v. *Barnette,* 319 U.S. 624, 642; *American Communications Association* v. *Douds,* 339 U.S. 382, 412 and 446, 449 (Mr. Justice Black dissenting); *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496; *Watkins* v. *United States,* 354 U.S. 178, 196; *Schneiderman* v. *United States,* 320 U.S. 118, 144; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 266 (Mr. Justice Frankfurter concurring); *Speiser* v. *Randall,* 357 U.S. 513, 536 (Mr. Justice Douglas,

concurring); *Brandenburg* v. *Ohio*, 395 U.S. 444, 450 (Mr. Justice Douglas, concurring).

Second, CPLR 9406(1) is overboard because it excludes from admission all applicants who do not (or cannot prove that they) believe in the form of government of the United States. The majority below candidly interprets the phrase "form of government of the United States" to mean "the essentials, democratic government and change by lawful methods." See *infra* at p. 33a.

Obviously, then, the political test embodied in CPLR 9406(1) at the very least does not contemplate belief in or advocacy of violent overthrow of government, though such beliefs and advocacy are unquestionably protected by the First Amendment from criminal punishment, see *Scales* v. *United States*, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Yates* v. *United States*, 354 U.S. 298; *Brandenburg* v. *Ohio*, *supra* at 448-449, and from becoming the basis of a finding of moral unfitness, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; cf. *Keyishian* v. *Board of Regents*, *supra*, at 607.

The decision below in upholding CPLR 9406(1), which "sweeps within its condemnation speech which our Constitution has immunized from governmental control," *Brandenburg* v. *Ohio*, *supra* at 448 directly conflicts with the rulings of this Court in *Keyishian* v. *Board of Regents*, *supra*; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Baggett* v. *Bullitt*, *supra*.

CPLR 9406(1) is not saved from the constitutional infirmity of overbreadth by arguing, as the majority below does, that the statute merely directs the admitting bodies to test whether an applicant can honestly take the constitutional oath of support.[19a] *Infra*, at 25a-26a.

[19a] Jud. L. § 466 requires each person, *upon being admitted to practice* by the Appellate Division, to take an oath set forth in N.Y. Const., Art. 13, § 1:

In *Bond* v. *Floyd*, 385 U.S. 116, this Court made it clear that First Amendment rights may not be restricted under the guise of testing the sincerity with which an individual can take an oath to support the Constitution and that the power to require such an oath "does not authorize a majority of the State legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution." *Id.* at 132. New York's screening program authorizes just what *Bond* forbids; the sincerity with which an applicant can swear to support the constitution is tested by the orthodoxy of his political beliefs and through an unrelenting and unrestricted search of his political past.[20]

The constitutional oath, as involved in this case differs substantially from a prospective pledge of support, see *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967) *aff'd per curiam* 390 U.S. 36. Here, the constitutional oath, applied through the medium of CPLR 9406(1), is transformed into a retrospective loyalty test. This raises substantial questions as to whether the oath, as a test rather than a promise, meets First Amendment requirements of precision; see generally Note, *Loyalty Oaths*, 77 Yale L.J. 739 (1968) and whether it does not violate the constitutional proscription against bills of attainder and *ex post facto*

"I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ————, according to the best of my ability."

[20] In *Bond* this Court expressed the fear that the power to judge loyalty " could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues." *Id.* at 132.

Such a fear is equally well-founded in the area of regulation of the Bar where repression of dissident political views has a long and unfortunate history. See *supra*, ftns. 13, 14. See also Brown & Fassett, *supra* at 495-496; 1 Emerson, Haber & Dorsen, *supra* at 262-283; 2 Chroust, *The Rise of the Legal Profession*, 5-8 (1965).

laws. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333; *United States* v. *Brown*, 381 U.S. 437.

Finally, the majority below errs by acknowledging the imprecision of CPLR 9406(1), *infra*, pp. 25a-26a, and then nevertheless sustaining the statute on the assumption that it will be properly implemented by appellees. This is wholly insufficient protection for First Amendment rights; the very existence of a statute, which because of vagueness and overbreadth, "lends itself to selective enforcement" or "is susceptible of sweeping and improper application" will not be tolerated in the area of First Amendment freedoms. See *NAACP* v. *Button*, *supra* at 433, 435; *Whitehill* v. *Elkins*, 389 U.S. 54, 61-62; *Smith* v. *California*, 361 U.S. 147, 151; *Speiser* v. *Randall*, 357 U.S. 513, 526. Reliance upon the self-restraint of the appellees is wholly unacceptable. See *Baggett* v. *Bullitt*, 377 U.S. 360, 373-374.

B. *New York Imposes Upon Each Applicant the Burden of Proving His Loyalty.*

The majority below argues in the alternative; first CPLR 9406(1) does not unequivocally place the burden of proving loyalty on the applicant, and second, if it does, such a burden is not unconstitutional.

The first argument is answered simply by reference to the statute's wording which in contrast to the statutory provision considered in the second *Konigsberg* case is clear in this regard.[21] See Weinstein, Korn & Miller, *New York Civil Practice*, ¶ 9406.01-03 (1968). There is absolutely no indication that the authors of CPLR 9406 intended to exempt subsection (1) dealing with belief in and loyalty to

[21] Cal. Bus. & Prof. Code § 6064.1 merely provided that no person may be certified for admission to the California Bar "who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means".

the form of government from the burden of proof requirement unquestionably applicable to subsections (2)-(4) dealing with citizenship, residence and other statutory and regulatory qualifications. See *Application of Lober*, 5 A.D. 2d 789 (2nd Dept. 1958); *Matter of Brennan*, 230 App. Div. 218, 219, 228 (2nd Dept. 1930).

The majority's alternative position is in direct conflict with *Speiser* v. *Randall*, 357 U.S. 513.

Judge Friendly attempts to avoid *Speiser's* force by arguing that, unlike applicants for tax exemption, candidates for bar admission are seeking a "public position, by virtue of which they could, if evilly motivated, create serious danger to the public safety." *Infra*, p. 23a, quoting from *Speiser* v. *Randall, supra*, at 527. But the premise of this argument has been thoroughly rejected by this Court. States may not condition governmental employment, licenses or benefits of any kind on the surrender of First Amendment rights. See *Keyishian* v. *Board of Regents, supra*, at 605-606; *United States* v. *Robel, supra*, at 264-266; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Schneider* v. *Smith, supra; Pickering* v. *Board of Education*, 391 U.S. 563, 568; *Schware* v. *Board of Bar Examiners, supra* at 239; and see also Reich, *The New Property*, 77 Yale L.J. 773 (1963); Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).[22] Nor is this case distinguishable from *Speiser* because infringement of First Amendment rights, here, is an unintended and incidental result

[22] *Garner* v. *Board of Public Works*, 341 U.S. 716; *Gerende* v. *Board of Supervisors*, 341 U.S. 56, and *American Communications Association* v. *Douds*, 339 U.S. 382 were distinguished in *Speiser* v. *Randall, supra* at 27. To the extent that these cases may have been thought to support the position of the majority below, we believe that they have been overruled in cases decided since *Speiser*. See *Keyishian* v. *Board of Regents, supra; United States* v. *Brown*, 381 U.S. 437; *Whitehill* v. *Elkins*, 389 U.S. 54.

of state regulation of the Bar. "For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button, supra* at 439; *Konigsberg* v. *State Bar,* 353 U.S. 252, 269; see also *Shelton* v. *Tucker,* 364 U.S. 479, 488-489.

The majority's assumption that a member of the bar is a public employee also raises a substantial question. See *Ex parte Garland, supra* at 378; *Spevack* v. *Klein,* 385 U.S. 511. A further problem arises from the majority's other unsupported assumption that lawyers, as such, pose a particular threat to the public safety. Even supposing that such dangers exist, New York may not protect its courts and the public by placing the burden of proving loyalty upon applicants or by employing other methods which deter the exercise of First Amendment rights where there is a "less restrictive alternative" available. *United States* v. *Robel, supra* at 265-268; *Aptheker* v. *Secretary of State, supra,* at 512-514; *Shelton* v. *Tucker, supra,* at 488-89; *United States* v. *O'Brien,* 391 U.S. 367, 381; *Schneider* v. *New Jersey,* 308 U.S. 147; Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464 (1969). As Judge Motley found below, contempt and disciplinary sanctions afford just such a precise, narrow and wholly adequate means of protection. See *infra,* p. 75a. Cf. *Stanley* v. *Georgia, supra* at 556-557; *United States* v. *Spock, supra.*[23]

The statutory burden of proof must also be constitutionally assessed in terms of its application. In their complaints, appellants alleged that the Committees utilize unorthodox associations, beliefs and activities disclosed by an applicant in the questionnaire or during the personal

[23] "The existing means of discovering and punishing illegal or professionally improper conduct, by presenting specific charges and supporting evidence, are ample . . . to meet any danger to our government or disgrace to our profession." *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy,* 37 ABA J 123 (1951).

interview as the triggering device for extended interrogation and long delays in issuing a certificate of admission. See Brown & Fassett, *supra* at 493-494. Appellants further alleged that the Committees customarily require applicants to give a detailed factual explanation for the unorthodox behavior. The effect of this is impermissibly to cast the burden on the applicant of proving the legality of these associations, beliefs or activities. See *Dombrowski* v. *Pfister, supra,* at 494-496; *Haskett* v. *Washington,* 294 F. Supp. 912, 915, 916-917 (D.D.C. 1968) (Wright, *J.*, concurring); see also the remarks of Archibald Cox in *The Alleged Subversive Applicant,* 54 Brief 149, 162-164 (1959).

Question 26(a) (*supra,* p. 10) is the best example of this practice. An affirmative answer to subsection (a), without more, places upon the applicant the burden of explaining to the Committee's satisfaction that his was lawful association. See *infra,* pp. 69a-70a.

This practice is exacerbated by the absence of statutory or judicial standards for determining what information or lack of information reasonably supports continued inquiry; of stated procedures safeguarding the applicant's right to timely and adequate notice of charges, to counsel, and to confrontation and cross-examination; and of statutory or regulatory standards by which to test the reliability and sufficiency of evidence.

C. *New York Conducts An Unlimited Political Inquiry of Each Applicant Without Probable Cause.*

As applied, New York's statutory-judicial scheme authorizes a limitless and roving search into the personal and political life of every applicant.

This sweeping authorization plainly fails to meet the constitutional standard of "precision" in two fundamental

respects. First, it empowers the defendants to invade an applicant's privacy without probable cause or foundation for inquiry. Second, the statutory-judicial scheme authorizes the type of "unlimited and indiscriminate search" condemned by this Court in *Shelton* v. *Tucker, supra;* see also *Schneider* v. *Smith, supra* at 24.

a. Every applicant must, as a matter of course, submit to the political interrogation conducted by the defendants. No preliminary showing of cause based on facts peculiar to an individual applicant is required. In this respect the present case contrasts sharply with the second *Konigsberg* case where the Court noted that the state's inquiry was based upon independent information which it had received concerning the California applicant, *Konigsberg* v. *State Bar, supra* at 45.[24]

The absence of probable cause to compel even limited disclosures of political associations or activities violates the First Amendment. The majority below failed expressly to rule on this issue, but its decision conflicts with the position of this Court.

Thus, *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539 stands as a barrier to the defendants' practices. In *Gibson,* the Court prohibited invasion of associational privacy in the absence of "an adequate foundation for inquiry"

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[24] This case also differs from *Konigsberg* v. *State Bar, supra* and *In re Anastaplo,* 366 U.S. 82, in the breadth of the present interrogatories as opposed to the comparatively narrow question involved in those cases of Communist Party affiliation which, for certain reasons, carried a presumed opprobrium. See *Gibson* v. *Florida Legislative Comm.* 372 U.S. 549. Though it need not be reached, a substantial question is raised concerning the validity of the second *Koningsberg* and *Antastaplo* decisions in light of the dissenting opinions in those cases and subsequent decisions of this Court. See *Gibson* v. *Florida Legislative Comm. supra* at 546; *Dombrowski* v. *Pfister, supra; Keyishian* v. *Board of Regents, supra.*

Id. at 557.[25] Such a foundation "is an essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry . . ." *Id.* at 551. See also *Schneider* v. *Smith, supra.* This foundation must be established upon independent [*Sweezy* v. *New Hampshire, supra* at 255, 261 (Mr. Justices Frankfurter and Harlan Concurring)], relevant (*DeGregory* v. *New Hampshire Attorney General,* 383 U.S. 825, 830) and substantial evidence (*Gibson* v. *Florida Legislative Comm., supra* at 555-556 and n. 7; *Speiser* v. *Randall, supra* at 529). Cf. *Uphaus* v. *Wyman,* 360 U.S. 72, 79.

This case is an even stronger one than *Gibson* for requiring an adequate foundation. The defendants are not merely collecting data for future legislation, but are possessed of an adjudicatory power to determine whether an applicant has engaged in unlawful political conduct. See *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96. Since a proceeding which involves such a determination is by its nature accusatory—the applicant is the target of investigation—absence of an adequate foundation violates the applicants' due process rights to notice of charges and to confrontation.[26] Cf *In re Ruffalo,* 390 U.S. 544, 550-551; *Jenkins* v. *McKeithen,* 395 U.S. 411.

The unjustified and unwarranted intrusion into the privacy of applicants would be a novel doctrine even if this case involved the most compelling state interests—public health and public safety. See *Camara* v. *Municipal Court,* 387 U.S.

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[25] In addition to the term "foundation", the Court also characterized the requirement by the descriptive terms: "nexus" and "probable cause". *Gibson* v. *Florida Legislative Committee, supra* at 546.

[26] In due process terms, there is no logical distinction between disbarment and denial of admission; both affect substantial, legal interests of the individual. See *In re Ruffalo,* 390 U.S. 544; cf. *Greene* v. *McElroy,* 360 U.S. 474; *Schneider* v. *Smith, supra* at 25; *Speiser* v. *Randall, supra* at 525-526; *Wieman* v. *Updegraff,* 344 U.S. 183, 190-191.

523; *See* v. *Seattle*, 387 U.S. 541; *Katz* v. *United States*, 389 U.S. 347; *Mapp* v. *Ohio*, 367 U.S. 643. In the First Amendment area such an intrusion is condemned as prior restraint. See *Marcus* v. *Search Warrant*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Freedman* v. *Maryland*, 380 U.S. 51; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155 n.4 and 159 (Mr. Justice Harlan, concurring).

b. The breadth of the defendants' investigatory power as authorized by New York's statutory-judicial scheme "pass[es] the outermost bounds of reason." *Schneider* v. *Smith, supra.* As exemplified by the questionnaires, the committees' authorization sanctions limitless interrogating of *every* applicant, under threat of perjury prosecution or delay or denial of admission. The inquiry, oral and written, may delve into *any* area, political, social, religious, professional, family, sexual or otherwise. See *infra* at pp. 43a-54a; Jackson, *Character Requirements for Admission to the Bar*, 20 Fordham L. Rev. 305, 316 (1951).[27]

This broad ranging inquiry rounds-up more information than is relevant or material, *Shelton* v. *Tucker, supra* at 488,

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[27] As Judge Motley, *infra*, pp. 49a-54a, illustrates, until recently the questionnaires specifically required each applicant to disclose *every* association, belief, speech, published writing and activity of *every* kind which he had ever made, held or been engaged in during his lifetime. Applicants were also required to write 100 word essays under oath on what they believe to be the "principles underlying the form of government of the United States." Compare Mr. Justice Fortas' concurring opinion in *Schneider* v. *Smith, supra* at 27.

In addition, after the commencement of these actions, appellees began to issue a form letter to applicants, who were required to fill in the address of their draft board and to sign it before a notary public. The letter authorized any of the appellees or their agents to have access to the applicant's Selective Service file for examination and copying. The majority noted "considerable doubt about the propriety of this" but refused to pass upon it because this practice was not specifically alleged in the complaints, *infra*, p. 39a, n. 9, although clearly within their scope.

and touches many areas in which the State has no legitimate interest at all. See *NAACP* v. *Alabama*, 357 U.S. 349; *Bates* v. *Little Rock*, 361 U.S. 516. Furthermore, as we have already demonstrated, see *supra*, pp. 17-18, "matters of belief are beyond the reach of subpoena or the probings of investigators." *Brandenburg* v. *Ohio*, *supra* at 456 (Mr. Justice Douglas, concurring); *Schneider* v. *Smith*, *supra* at 25.

The majority's rulings on questions 26 and 27(a) and (b) also raise substantial issues.

Subsection (a) of Question 26 (*supra*, p. 10) in seeking from the applicant full particulars concerning his "association" no matter how stale, with an unlimited number of organizations, whose purposes he must guess at his peril, suffers from the vice of overbreadth. See *Shelton* v. *Tucker*, *supra*; *Schneider* v. *Smith*, *supra* at 24-25 and 27 (Mr. Justice Fortas, concurring).

Furthermore, Question 26(a) is not restricted in its inquiry to organizations whose advocacy or teaching "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." See *Brandenburg* v. *Ohio*, *supra*, at 447 and n. 2, 448-449. "Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action" *Id.* at 449 n. 4.[28]

Another serious deficiency in Question 26(a) involves the terms "advocating", "teaching" and "any unlawful

[28] Likewise, subsection (b) of Question 26 fails to take into account the element of "imminent danger" without which specific intent to further an organization's illegal aims is not criminal. See *Brandenburg* v. *Ohio*, *supra*; *Yates* v. *United States*, 354 U.S. 298, 321-322.

means" which are too vague. These terms fail to provide an adequate guide to an applicant giving a sworn statement, upon the accuracy of which both his professional career and his susceptibility to criminal prosecution depends. See *Keyishian* v. *Board of Regents, supra* at 600-601; *Boyle* v. *Landry*, 280 F. Supp. 938, 955, 964 (D. Ill. 1968) *prob. juris. noted*, 393 U.S. 974, *rearg. ordered*, 395 U.S. 955 Moreover, the applicant must take his chances in answering Question 26(a) that his evaluation of an organization's purposes coincides with the appellees'. No procedural safeguards exist to insure that the organization's aims are reliably determined by appellees. See *Dombrowski* v. *Pfister, supra* at 495-496; *Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123. In these circumstances the applicant must choose between over-disclosure or the unachievable: making certain, beforehand, that none of his associations fall under the question's coverage. See *Speiser* v. *Randall, supra* at 526.

Finally, as we have indicated earlier (*supra* p. 23), Question 26(a) is plagued by yet another fundamental defect. The question, even as revised, creates an unreasonable presumption of guilt through association against one who, knowing both the legal and illegal purposes of an organization, shares only the former. See *Brandenburg* v. *Ohio, supra; Baggett* v. *Bullitt, supra.* Thus it impermissibly shifts to the applicant the burden of proving lawful association, and more broadly, his loyalty. *Speiser* v. *Randall, supra; Dombrowski* v. *Pfister, supra* at 494-496; *Haskett* v. *Washington, supra* at 915 (Wright, *J.*, concurring).

Substantial problems are presented by the Question 27(a) as revised (*supra*, p. 11) and Question 27(b) upheld by the majority in its original form (*supra*, p. 8).

Revised Question 27(a), like Question 31 (*supra*, p. 8) requires the applicant "to engage in soul-searching of his entire past life", see *supra*, p. 11. The self-exorcism de-

manded by revised Question 27(a) is all the more pernicious because of its focus on political beliefs.[29]

Question 27(b) in forbidding an applicant to have "any mental reservation" regarding his loyalty to and support of the Constitution suffers from the same deficiencies as Question 27(a) revised because the unmistakable purpose of subsection (b), like subsection (a) is the suppression of wayward political beliefs. See also ftn. 29, *supra*.

The third-party affidavits raise important questions in view of this Court's staunch and unabating protection of the right to personal privacy. See *Griswold* v. *Connecticut*, 381 U.S. 479; *Stanley* v. *Georgia, supra; Katz* v. *United States, supra;* and generally 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States, supra* at 1258-1264. As Judge Motley demonstrates, *infra* at pp. 43a-47a, the affidavit forms and instructions even though revised are nevertheless an unrestricted license to search an applicant's personal and family life.[30]

Overall, New York's complex scheme governing admission to the Bar, like the State's similarly "complicated and intricate scheme" for ferreting out disloyal teachers condemned in *Keyishian* v. *Board of Regents, supra,* is by the "very intricacy of the plan and the uncertainty as to the scope of its proscriptions . . . a highly efficient *in terrorem* mechanism." *Keyishian* v. *Board of Regents, supra,* at 601, 604.

3. We believe that infringement of the First Amendment rights of applicants is not so much the fault of appellees as it is the unavoidable consequence of their undertaking.

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[29] Question 27(a) revised may also be viewed as a test oath. As such, there is substantial question whether it is not too vague and whether it does not violate the constitutional proscription against *ex post facto* laws and bills of attainder.

[30] Judge Motley's analysis refutes Judge Friendly's unqualified and unquestioning conclusion that the "forms of these affidavits have recently undergone radical curtailment." See *infra*, p. 29a, n. 9.

For there is substantial question as to whether the power to determine political fitness can ever be delegated and administered with constitutional precision. In *Schware* v. *Board of Bar Examiners, supra*, this Court found that the standard for political disqualification requires a finding of moral turpitude in connection with illegal political conduct. *Id.* at 242-243.[31] The difficulty in defining or implementing this standard is compounded by the further requirement that the moral implications of an applicant's political conduct must be assessed in terms not only of contemporary but future community values. See *Schware* v. *Board of Bar Examiners, supra; Hallinan* v. *Committee of Bar Examiners*, 421 P. 76, 86-87 (Cal. S. Ct. 1966). Even if the appellees could exclude subjectivity from their judgments, the task of making such a determination is overwhelming especially in the area of political activities, where community standards are inevitably in a state of constant change. But, in reality, the power to review the morality of another's political conduct is an open invitation to caprice and arbitrariness.[32]

4. The majority erred in denying appellants' motion for an injunction against the statutes and judicial rules as applied through the questions, practices and regulations which were in effect at the time these suits were commenced but which ceased or were withdrawn before the court below rendered its decision. As Judge Motley correctly points out, these questions, practices and regulations only exemplified the scope of the appellees' investigatory-adjudicatory powers authorized by the challenged statutes and judicial rules. Therefore,

> "[t]he net effect of these changes and deletions . . . is to leave unchanged the First and Fourteenth Amend-

[31] Contrary to Judge Friendly's view, *infra*, p. 22a, the standard for political unfitness is, at the minimum, unlawful conduct. *Speiser* v. *Randall, supra* at 525-526; *Keyishian* v. *Board of Regents, supra* at 607.

[32] These problems are exacerbated by the fact that the appellees do not represent either a racial, economic, age, social or political cross-section of the community.

ment challenge to the statutes. "The substance of the statutory and regulatory complex remains and from the outset . . . [plaintiffs'] basic claim has been that they are aggrieved by its application." *Keyishian* v. *Board of Regents of State of New York*, 385 U.S. 589, 596, 87 S. Ct. 675, 680, 17 L. Ed. 629 (1967). See also, *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)." *Infra*, p. 49a.

Furthermore, there has been merely a cessation by the appellees of their long standing practices. Appellees have not and, as long as the statutory-judicial scheme exists, they can not give affirmative assurances that such practices will not reoccur. This Court has held that these circumstances, particularly in the First Amendment area, present an insufficient basis for denying an injunction. See *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-633; *Gray* v. *Sanders*, 372 U.S. 368, 376; *Moore* v. *Ogilvie*, 394 U.S. 814; *Carroll* v. *President and Commissioners of Princess Anne County*, 393 U.S. 175; *United States* v. *Concentrated Phosphate Export Assn.*, 393 U.S. 199.

5. The history of application of the challenged statutes and judicial rules demonstrates that this complex scheme does not contain adequate standards to confine the cast of appellees' investigative net within Constitutional boundaries. In effect, the apparent validity of these provisions on their face has been thoroughly undermined by their unconstitutionally sweeping application over a period of decades under the tacit, if not express, sanction of the New York Court of Appeals.

We believe that under these circumstances the statutory-judicial scheme should be treated as invalid on its face. An injunction should issue restraining the enforcement of the challenged statutes and judicial rules until they are revised expressly to provide for procedural safeguards and substantive limitations.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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October 3, 1969

APPENDIX A

Statutes and Judicial Rules Involved

New York Civil Practice Law and Rules

Article 94—Admission to Practice

RULE 9401. Committee

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

RULE 9404. Certificate of character and fitness

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his present and such past places of actual residence as may be required by the committee and the appellate division, listing the street

and number, if any, and the period of time he resided at each place.

RULE 9406. Proof

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

JUDICIARY LAW § 90(1)(a):

§ 90 Admission to and removal from practice by appellate division; character committees.

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall

have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

NEW YORK JUDICIARY LAW: Appendix:

Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

Rule VIII. Proof of Moral Character.

VIII-1. General Regulation.

Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2. Supporting Affidavits.

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

VIII-3. Certificate of Board of Law Examiners.

Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

VIII-4. Discretion of Appellate Division.

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

APPENDIX B

Opinion of Judge Motley

UNITED STATES DISTRICT COURT

S. D. New York

Sept. 25, 1968

Nos. 68 Civ. 2917; 68 Civ. 2938

Law Students Civil Rights Research Council Inc., *et al.*

v.

Wadmond, *et al.*

Stephen Martin Wexler, *et al.*

v.

The Supreme Court of the State of New York, Appellate Division, First Judicial Department, *et al.*

Memorandum Decision and Order for Three Judge Court

Motley, District Judge.

Plaintiffs in these two actions attack the constitutionality of certain New York statutes, rules and regulations relating to the character and fitness of those seeking admission to the New York bar. More specifically, plain-

tiffs claim, inter alia, that rights guaranteed them by the First and Fourteenth Amendments to the Federal Constitution are being violated by defendants' enforcement of the statutory and regulatory provisions under attack. Plaintiffs say that these statutes, rules and regulations are unconstitutional on their face and as applied.

The first statute in question is the New York Judiciary Law, McKinney's Consol. Laws, c. 30, § 90(1). That statute confers upon the Appellate Division of the Supreme Court in each Judicial Department the power to admit applicants to the bar upon the state board of law examiners certifying to it that the applicant has passed the required examination. The statute decrees that the Appellate Division shall admit such person to practice "if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor-at-law." The statute also contains the proviso that the applicant shall be admitted to the bar only if he has complied with the rules in all respects of the Court of Appeals of the State and the Appellate Division.

The Appellate Division is directed by statute (New York Civil Practice Law and Rules, Rule 9401) to appoint a committee for each Appellate Division District "for the purpose of investigating the character and fitness of every applicant for admission to practice." Every application for admission by a person who has been certified by the state board of law examiners must be referred to the committee for the district in which such person actually resides. (New York CPLR, Rule 9402). Unless otherwise ordered by the Appellate Division, "no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission." (N.Y.C.P.L.R., Rule 9404). "To enable the committee to make such investigation the committee,

subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire in which they shall set forth * * * all the information and data required by the committee and the appellate division justices." (N.Y. C.P.L.R., Rule 9404). The committee is enjoined by statute from issuing its certificate to any person and the Appellate Division is precluded by the same law from admitting any person to practice, unless such person, inter alia, shall furnish satisfactory proof to the effect "that he believes in the form of the government of the United States and is loyal to such government." (N.Y.C.P.L.R., Rule 9406).

Rule VIII of the Rules of the Court of Appeals For Admission of Attorneys and Counselors-At-Law (Judiciary Law-Appendix) requires every applicant to "produce before a Committee on Character and Fitness * * * and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides."

Plaintiffs in 68 Civ. 2938 allege in their complaint that the Judiciary Law § 90, C.P.L.R. Rules 9401-9406, and Rule VIII of the Court of Appeals lack sufficient standards and are in violation of, inter alia, the First and Fourteenth Amendments.[1]

With greater specificity, these plaintiffs allege that Rule 9406: 1) improperly requires an applicant to bear an unlimited and indefinite burden of proof of his belief in and loyalty to the form of our government; 2) is unreasonably vague; and 3) improperly makes belief in our form of government a condition of admission to the bar.

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[1] Complaint, para. 15(a).

Also, plaintiffs say belief in our form of government is not reasonably related to the legitimate objectives of the state in determining character and fitness.[2]

Plaintiffs in 68 Civ. 2938 then assail in their complaint certain questions propounded by the Committees on Character and Fitness of the First and Second Departments of the Appellate Division in their questionnaires. Examples of the questions under attack are the following:

> "20. Have you participated in activities of a public or private nature or in philanthropic, religious, or social services? If so, state fully.
>
> "21(A). Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member."[3]
>
> * * * * * *

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[2] Complaint, para. 15(b).

[3] Questions 20 and 21(A) appearing in Questionnaire of First Department. Other questions attacked are:

> "22. (A) Are you now or have you ever been a member of or affiliated in any way with any of the organizations or groups listed as subversive by the Attorney General of the United States?
>
> (B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?
>
> If your answer is yes to either subdivision of this question, give the following information:
>
> Name and address of organization or group * * *
>
> When you became a member or affiliated with it * * *
>
> Period of your association or connection with it * * *
>
> How and why you became associated or connected with it * * *
>
> How and why you severed your connection with it, if you did."
>
> "23. Have you ever participated in any way whatsoever in the activities of such organizations or groups? If so, to what extent."

"32. Have you written any articles for publication? If so, give the circumstances, the name of publication, the date of publication, and the title and subject matter of the article.

* * * * * *

"36. (a) Are you now, or have you ever been at any time (including the time during which you attended high school, college and law school, and including the time during which you engaged in military service or any community activity) a member of any club, association, society or organization or political party.

(b) If answer be yes, give the name, address and objects of each and every such club, association, society or organization or party and state the period of your membership and your position or title therein."[4]

The foregoing questions are challenged on the ground that they violate the First and Fourteenth Amendments. Plaintiffs say that they are: 1) overbroad and without reasonable limitation; 2) compel disclosure of political beliefs, associations, speech and activities protected by the First Amendment and make such factors relevant in determining admission to the bar; 3) compel disclosure of re-

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[4] Questions contained in Questionnaire of Second Department. Other questions attacked are:

"35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

(b) Are you now or have you ever been a member of any party or organization created for such purpose or for the propagandizing or the furtherance thereof?

(c) If answer is yes, state the name of the party or organization.

(d) Are you now, or have you ever been, a member of the Communist Party, or have you ever been enrolled as a member of the Communist Party?

ligious activities, beliefs and associations and likewise make such factors considerations in determining admission to the bar.[5]

Plaintiffs in 68 Civ. 2938 attack the constitutionality of the oaths required in the Committees' Questionnaires on virtually the same constitutional grounds set forth above.[6] The oaths required by the First Department are:

> "24(A) Do you believe in the principles underlying the form of government of the United States? State on a rider, in not less than 100 words, what you believe those principles to be.
>
> (B) Can you conscientiously and do you affirm that you are, without any mental reservations, loyal to the Government of the United States?"

The oaths required by the Second Department are as follows:

> "33. Do you believe in the principles underlying the form of government of the United States? Briefly state the reasons for your answers.
>
> "34. Do you conscientiously affirm (without any mental reservation) that you are loyal to the Government of the United States of America?"

Plaintiffs challenge on similar constitutional grounds the content of the personal interviews of applicants required by the Committees. Plaintiffs claim that improper inquiry is often made concerning applicant's First Amendment activities.[7]

Finally, plaintiffs assail the practice of the Committees in requiring applicants to obtain and submit affidavits of "character and home life" on the ground that this practice

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[5] Complaint, para. 15(c) and (d).

[6] Complaint, para. 15(e).

[7] Complaint, para. 16(a).

constitutes an unlimited and indiscriminate invasion of the applicants' privacy in violation of the Fourth and Fourteenth Amendments.[8] Similar allegations are made in the complaint in 68 Civ. 2917.[9]

Plaintiffs in both cases claim that the foregoing statutes, rules, regulations and practices have the effect of deterring and inhibiting the exercise of rights of speech, association and belief guaranteed by the First Amendment.

The relief sought by plaintiffs in each action is a declaratory judgment declaring the above statutes, rules, questions and practices unconstitutional and a permanent injunction enjoining defendants from enforcing same.

These actions are before this court on motions by plaintiffs to convene three-judge courts pursuant to 28 U.S.C. § 2281 et seq. Plaintiffs in 68 Civ. 2917 also move to consolidate the two suits pursuant to Rule 42(a), Fed.R. Civ.P. The latter motion and the motion to convene a three-judge court in 68 Civ. 2917 were referred to this court, with consent, by Judge Wyatt on August 27, 1968.

Only a three-judge district court operating under 28 U.S.C. § 2284 may enjoin the enforcement or execution of a state statute as unconstitutional. Such court must be convened where the constitutional issue or issues are not wholly insubstantial or obviously without merit. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962); Green v. Board of Elections of City of New York, 259 F.Supp. 290 (S.D.N.Y. 1966), aff'd 380 F.2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840 (1968). Without in any way passing on the substantiality of other constitutional issues raised by plaintiffs, the court finds certain of the constitutional issues not wholly insubstantial.

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[8] Complaint, para. 16(b).

[9] See paragraphs 6, 8, 9, 10.

C.P.L.R. Rule 9406 requires an applicant for admission to the bar to prove his belief in the form of the government of the United States and his loyalty. A substantial constitutional question is raised as to whether placing the burden of proof on the applicant will not deter speech and association protected by the First and Fourteenth Amendments when the consequences of failure of proof are severe and the matter to be proved is difficult of definition. Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)

A substantial question is raised as to whether the language of C.P.L.R. Rule 9406 and the required oaths is unconstitutionally vague or broad and consequently infringes upon First Amendment freedoms. Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Keyishian v. Board of Regents, etc., 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967).

The questions set forth above which are contained in the Character Committees' Questionnaires call for a broad disclosure of all of the applicant's activities and associations. A substantial constitutional question is raised as to whether the threat of such disclosure will not deter the prospective member of the bar in his associations while in college and law school in violation of the First and Fourteenth Amendments; Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968).

Plaintiffs also make an adequate showing of the need for equitable relief. The nature of the wrong claimed is a "chilling" of speech and association while in college and law school, and the wrong claimed would not be remedied by an attack on the regulatory scheme during the process

of admission when the damage had been done. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).[10]

Accordingly, the motions to convene three-judge courts are granted and the cases are referred herewith to the Chief Judge of the Circuit. 28 U.S.C. §2284.

The plaintiffs' motion in 68 Civ. 2917 to consolidate the two suits under Rule 42(a), Fed.R. Civ.P., is improperly presented at this time. The power of a single district judge in hearing an application to convene a three-judge court is limited to the jurisdictional inquiries of whether a substantial constitutional question is presented, a basis for equitable relief is presented, and 28 U.S.C. § 2281 is otherwise complied with. Green v. Board of Elections of City of New York, supra, 259 F.Supp. at 292; Idlewild Bon Voyage Liquor Corp. v. Epstein, supra, 370 U.S. at 715, 82 S.Ct. 1294. Such a motion might be heard by a single judge of the three-judge court after it is appointed, but then the decision by the single judge is subject to the safeguard of review by the full court before final hearing of the suit, 28 U.S.C. § 2284(5). The motion to consolidate is denied without prejudice to its renewal before either three-judge court.

So ordered.

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[10] The individual plaintiffs in 68 Civ. 2917 are presently law students and plan to apply for admision to the New York bar. One of the organizational plaintiffs in 68 Civ. 2938 is composed of law students similarly situated. The individual plaintiffs in 68 Civ. 2938 have passed New York's written bar exam and allege infringement of their political and civil rights while awaiting admission.

APPENDIX C

Opinion of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

February 17, 1969

—o—

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et a*

v.

WADMOND, *et al.*.
STEPHEN MARTIN WEXLER, *et al.*

v.

The SUPREME COURT OF THE STATE OF NEW YORK, APPELLA
DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*

68 Civ. 2917, 2938.

—o—

Before FRIENDLY, *Circuit Judge*, and BONSAL and M
LEY, *District Judges.*

FRIENDLY, *Circuit Judge*:

These two actions for injunctive and declaratory reli
invoking our jurisdiction, 28 U.S.C. § 1343(3), to enforce t
Civil Rights Act, 42 U.S.C. § 1983, challenge the cons
tutional validity of procedures for admission to the N
York bar, both generally and particularly as applied

the First and Second Judicial Departments.[1] The plaintiffs in 68 Civ. 2938 are three candidates certified as having passed their bar examinations, the Columbia Law Students Guild, and the New York City Chapter of the National Lawyers Guild. The plaintiffs in 68 Civ. 2917 are the Law Students Civil Rights Research Council, Inc., an organization of some 1,500 law students with chapters at sixty law schools including four in New York City, and three law students who plan to apply for admission to the New York bar when eligible. Both actions are sought to be maintained as class actions on behalf of all persons seeking or planning to seek such admission. The defendants are the Appellate Divisions and their Justices and the Committees on Character and Fitness for the First and Second Judicial Departments and their members.

Section 90(1) of the New York Judiciary Law, McKinney's Consol. Laws, c.30, provides

> Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of

[1] The state of New York is divided by law into four judicial departments. N.Y. Const. Art. 6, § 4; Judiciary Law § 70. The First Department embraces the counties of New York and Bronx; the Second, the counties of Richmond, Kings, Westchester, Putnam, Dutchess, Orange, Rockland, Nassau, Suffolk, and Queens. Judiciary Law §§ 70, 140.

> appeals and the rules of the appellate divisions relating to the admission of attorneys.

This provision is implemented by Article 94 of the Civil Practice Law and Rules enacted in 1962, which adopts rules previously promulgated by the Justices of the Appellate Divisions. The rules [2] comprising Article 94 direct the appellate division in each judicial department to appoint a committee to investigate the character and fitness of each applicant for admission, R. 9401; prescribe that "unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission," R. 9404; and authorize such committee, "subject to the approval of the justices of the appellate division, * * * to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his present and such past places of actual residence as may be required * * *", R. 9404. Rule 9406 directs:

> No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:
>
> 1. that he believes in the form of the government of the United States and is loyal to such government * * *

The complaints attack a number of these provisions as violating the First Amendment to the Constitution

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[2] Provisions of the Civil Practice Law and Rules which are denominated as Rules may be changed by the judicial conference of the state. See CPLR § 102 and Judiciary Law § 229.

as made applicable to New York by the Fourteenth. The statutory provisions, notably § 90(1) (a) of the Judiciary Law and the quoted portion of Rule 9406, are challenged as being so vague and impermissibly broad as to have a "chilling effect," see Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), on plaintiffs' exercise of their First Amendment rights. Rule 9406 is challenged as allowing investigation into mere beliefs and denial of admission for them and as placing on applicants a burden of proof they cannot constitutionally be made to bear. The questionnaires prescribed by the two committees are criticized as requiring disclosure of acts and associations beyond the scope of proper inquiry. Believing that substantial constitutional issues had been tendered, Judge Motley requested the Chief Judge of the Circuit to invoke a court of three judges, 28 U.S.C. §§ 2281, 2284, and this was done. Judge Motley reserved judgment on the motion made by plaintiffs in 68 Civ. 2917 to consolidate the two suits pursuant to Fed.R.Civ.P.42(a); we grant the motion and have considered the cases together. Plaintiffs have sought summary judgment or, if that not be granted, a preliminary injunction and discovery. The defendants have moved for dismissal of the complaint or, in the alternative, or dismissal so far as the complaint relates to the statutes [3] and remission of the issues concerning the questionnaires to Judge Motley.

I.

Before proceeding to the merits we must examine claims made with respect to the standing of the plaintiffs, the suability of the defendants, the failure to join the Court of Appeals or its members, and the desirability of abstention.

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[3] We shall use that term as embracing the Rules, see note 2.

With respect to the individual plaintiffs, defendants admit the standing only of the three who have passed the bar examination. They contend, however, that, so far as concerns the statutes, these three have no need for equitable relief since, if the character committee should refuse them certification on an impermissible ground, they can obtain an adequate remedy by applying to the appellate division and, if the state courts persist in refusal, by seeking review in the Supreme Court; and that, so far as concerns the questionnaires, their objections are at most a matter for a single judge since each questionnaire is effective only in part of the state. We find it unnecessary to evaluate this argument.[4] For we believe the three plaintiffs who are law students intending to apply for admission have standing to seek equitable relief since they have set themselves apart from the public at large sufficiently to have standing to protest statutes governing admission to the bar that may inhibit exercise of First Amendment rights during the period of their study. Cf. Gart v. Cole, 263 F.2d 244, 250 (2 Cir.), cert. denied, 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959); Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964); Overseas Media Corp. v. McNamara,

[4] Defendants also argue that the plaintiffs who have passed the examination have, by presenting their certificates to the appellate division and obtaining questionnaires from the character committee, commenced "proceedings in a State court" within the anti-injunction statute, 28 U.S.C. § 2283, and that the grant of an injunction would violate that statute. Even if this were true, it would not prevent us from granting an injunction in favor of the law students. Further, we see no merit in the argument, quite apart from any question whether the Civil Rights Act creates an exception to § 2283. The purpose of the anti-injunction statute is to prevent a state court defendant from invoking the aid of a federal court to block an action instituted against him—not to prevent a state court applicant from seeking federal aid to eliminate what he considers an unconstitutional roadblock created by the state.

128 U.S.App.D.C. 48, 385 F.2d 308 (1967); Davis, Standing: Taxpayers and Others, 36 U.Chi.L.Rev. 601, 617-628 (1968). Since these students raise a substantial constitutional question with respect to at least one of the statutes, a court of three judges is required for that purpose; the argument that attack on the questionnaires should be remitted to a single district judge will be examined later in this opinion. We also have no occasion now to consider the standing of the various organizations that have joined in the complaints.

In considering whether an injunction or a declaratory judgment should be issued, we start from the principle of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that when officers administering a state statute act in a manner that exceeds constitutional limits, they have no claim to sovereign immunity. Against this is the equally well settled principle that a judge exercising his judicial function is not liable for damages under 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. 547, 553-555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

While the interest served by the latter principle in making the state judge free "to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants," without "fear that unsatisfied litigants may hound him with litigation charging malice or corruption," Pierson v. Ray, supra, 386 U.S. at 554, 87 S.Ct. at 1218, is an important one, its applicability to an injunction is by no means clear. See United States v. McLeod, 385 F.2d 734, 738 (5 Cir. 1967) (Wisdom, J.). We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by

those who are. Rather it would seem anomalous that while federal courts could entertain a complaint similar to the plaintiffs' if made with respect to other licensed professions, such as medicine or accountancy, they are powerless with respect to admission to the bar. The grant of injunctive relief in a case like this would not have the *in terrorem* effect on state judges that the threat of a subsequent damage action would have; rather, it would furnish a definitive ruling on a point of federal law for their future guidance, and, as shown above, fn. 4, would not infringe the policy expressed in the federal anti-injunction statute, 28 U.S.C. § 2283, proscribing injunctions that would stay "proceedings in a State court." The criteria set forth in Dombrowski v. Pfister, supra, for the grant of the extraordinary relief of injunction against the enforcement of a state statute are alleged to be present here. Plaintiffs do not challenge a state court's disposition of an individual case, but attack as "overly broad and vague regulations of expression," see 380 U.S. at 490, 85 S.Ct. at 1123, the rules and regulations promulgated and administered by the appellate divisions and their delegates. The alleged infringement of First Amendment rights of law students cannot be dissipated by the processing of particular individuals' applications for admission to the bar. These factors, which were "controlling on both the exercise of equitable power and the abstention issue" in Dombrowski, see Cameron v. Johnson, 381 U.S. 741, 755, 85 S.Ct. 1751, 14 L.Ed. 2d 715 (1965) (White, J., dissenting), make appropriate our consideration of equitable relief even though the defendants would be immune from liability in damages for their administration of the challenged procedures, see Saier v. State Bar of Michigan, 293 F.2d 756 (6 Cir.), cert. denied, 368 U.S. 947, 82 S.Ct. 388, 7 L.Ed.2d 343 (1961); Gately v. Sutton, 310 F.2d 107 (10 Cir. 1962); Clark v. Washington, 366 F.2d 678 (9 Cir. 1966) (judges and their delegates immune

for roles in disbarment proceedings). To hold otherwise would be to leave without a remedy a significant class of the deprivations of federal rights under color of state law, that Congress intended the federal courts to redress under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

We likewise see no force in defendants' argument that the suits should be dismissed, pursuant to Fed. R.Civ.P. 19, for failure to join the Court of Appeals or its members. While plaintiffs' attack on the "statutory scheme" governing admission to the bar takes in a Rule of the Court of Appeals, Rule VIII, the involvement of that rule does not necessitate joinder of its authors any more than an attack on the application of a statute requires joinder of the legislature. Moreover, the rule, adopted to implement Judiciary Law § 90, is attacked only for failing to furnish standards more precise than those found in § 90 and CPLR Article 94, and thus failing to rescue the procedure from the defects that allegedly inhere in the latter provisions. Section 90 and Article 94 have been enacted by the Legislature, and they place actual administration in the appellate divisions and their delegates, the committees on character and fitness, not in the Court of Appeals. There is no practical obstacle to adjudication of the constitutionality of this procedure in the absence of the Court or its members. Contrast Association For the Preservation of Freedom of Choice, Inc. v. Wadmond, 215 F. Supp. 648, 651-652 (S.D.N.Y.1963).

With respect to abstention, defendants have not made clear what debatable issues of construction state proceedings could resolve. Their contention is rather that admission to the bar is so peculiarly a matter of state concern that its resolution should be left to the state courts, subject, of course, to review by the Supreme Court. But that Court has given short shrift to similar claims in matters, equally of state concern, such as education, McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10

L.Ed.2d 622 (1963), and state employees, Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

We therefore proceed to the merits.

II.

We need not tarry long over the claim that the requirement of § 90(1) (a) of the Judiciary Law that entrance to the bar shall be allowed only to a person who "possesses the character and general fitness requisite for an attorney and counsellor-at-law" is impermissibly vague. We perceive no significant distinction between this and California's requirement of "good moral character," duplicated in many other states, which the Court said in Konigsberg v. State Bar of California, 366 U.S. 36, 40-44, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961), could not "well be drawn in question." Indeed, New York's requirement is somewhat more definite in specifying that the character traits required are those directly related to suitability for the practice of law. Once it is granted that the state can constitutionally require something more of applicants for admission to the bar than absence of the kind of criminal record that would warrant expulsion, as *Konigsberg* must be taken to have decided, the state must perforce use language of some generality. Such words, like others familiar in our law, acquire content through years of administration, see, e.g., Re Peters, 221 App.Div. 607, 225 N.Y.S. 144, aff'd, 250 N.Y. 595, 166 N.E. 337, rearg. denied, 252 N.Y. 572, 170 N.E. 148 (1927) (admission denied because of disbarment in another state); Re Greenblatt, 253 App.Div. 391, 2 N.Y.S.2d 569 (1938) (admission denied because of misrepresentations to character committee about applicant's dismissal from college for misconduct); Application of Cassidy, 268 App.Div. 282, 51 N.Y.S.2d 202, aff'd on rehearing, 270 App.Div. 1046, 63 N.Y.S.2d 840, aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1944)

(admission denied because applicant urged creation of armed units for forceful overthrow of government and made inconsistent statements indicating lack of veracity). See also Schware v. Board of Bar Examiners, 353 U.S. 232, 247, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (concurring opinion of Mr. Justice Frankfurter). Plaintiffs' affidavits and briefs are eloquently silent about instances where New York has unjustifiably denied admission for lack of "the character and general fitness requisite for an attorney and counsellor-at-law."

III.

Rule 9406 demands more discussion. Plaintiffs' initial criticism is procedural. They say the requirement that the applicant "shall furnish satisfactory proof" of belief in our form of government and loyalty to it unconstitutionally imposes a burden of proof in violation of Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). We think that case fairly distinguishable on two grounds: The statute condemned in *Speiser* applied to all veterans claiming property tax exemption, and the Court differentiated loyalty oaths required of "a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, creates serious danger to the public safety." 357 U.S. at 527, 78 S.Ct. at 1343. Lawyers, who are officers of the courts, fit the latter rubric. In Konigsberg v. State Bar, *supra*, 366 U.S. at 54, 81S.Ct. 997, the Court noted this distinction. Rule 9406 is also sustainable on the other ground taken in *Konigsberg*, 366 U.S. at 55, 81 S.Ct. 997, namely, the lack of "unequivocal indication" that it imposes a true burden of proof as distinguished from a burden of coming forward with evidence. We see no reason why New York may not impose the latter with respect to a subject concerning which the applicant has detailed knowledge but the committees would be required to make extensive investigation.

Opinion of the District Court for the Southern District of New York

Plaintiffs' substantive attack is that Rule 9406 has the breadth branded as unconstitutional in such important recent cases as Baggett v. Bullitt, *supra*, 377 U.S. 360, 84 S.Ct. 1316; Elfbrandt v. Russell, 384 U.S. 11, 86S.Ct. 1238, 16 L.Ed.2d 321 (1966); and Keyishian v. Board of Regents, *supra*, 385 U.S. 589, 87 S.Ct. 675 (1967). When one examines the decisions, in contrast to culling phrases from them, they are plainly distinguishable. What the Court found defective in *Baggett* about the teachers' oath specified in the Washington laws of 1931[5] was the part exacting a promise that the affiant would "by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." The Court held that to require teachers to make so broad a promise provided no "ascertainable standard of conduct" and required "more than a State may command." 377 U.S. at 372, 84 S.Ct. at 1322. The defect in *Elfbrandt* was not the oath required of state employees, see 384 U.S. at 12, 86 S.Ct. at 1239, but the statute subjecting to prosecution for perjury and to discharge from public office anyone who during his "term of office or employment knowingly and willfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions." This was condemned as including "those

[5] "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." 377 U.S. at 361-362, 84 S.Ct. at 1317.

who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities * * *," 384 U.S. at 17, 86 S.Ct. at 1241, a position foreshadowed by Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6L.Ed.2d 782 (1961). See also United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Haskett v. Washington, 294 F.Supp. 912 (D.D.C. 1968). Finally, what the Court struck down in *Keyishian* was a "complicated plan," 385 U.S. at 601, 87 S.Ct. 675, imposing a variety of ill defined restraints on teachers in New York's public schools and colleges.

Rule 9406 is not an oath; the oath required to be taken upon admission to the bar, Judiciary Law § 466, is the "constitutional oath" New York Constitution, Art. XIII, § 1, "that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of ——, according to the best of my ability." The constitutionality of this oath is established by Knight v. Board of Regents, 269 F.Supp. 339 (S.D.N.Y. 1967), aff'd per curiam 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812 (1968). Neither does Rule 9406 hang *in terrorem* over persons admitted to the bar, like the statutes condemned in *Elfbrandt* and *Keyishian*; it goes to belief at the time of admission only. The claim is rather that the alleged undue breadth of the Rule will have an unconstitutionally inhibiting effect on persons who contemplate seeking admission to the bar, notably law students, since they will fear lest becoming members in controversial organizations or engaging in protests will be taken to evidence lack of belief in the form of government of the United States or disloyalty to it.

If one assumes a proper implementation of Rule 9406, plaintiffs' apprehensions seem unwarranted. The Rule does not prescribe a formula to which the applicant must adhere but is rather a direction to the committees and the appellate divisions to guide them in performance of their

functions under the statutory scheme. It instructs these bodies, before forwarding an applicant to take the constitutional oath, to satisfy themselves through analysis of the factual data before them of his belief in and loyalty to the government he will swear to support. Defendants interpret this command as directing them "to test whether applicants for admission can truly subscribe to the 'constitutional oath of office' "; they read "the form of the government of the United States" to mean exactly what comes within the oath of support, and "loyalty to such government" to mean ability to take the oath in good faith. This construction of the statute by the very agencies charged with its administration is commended by reason. Since those who authored Rule 9406 were quite as aware as we are that the First Amendment lies at the very heart of our "form of government," we should not lightly suppose they had any idea that applicants should be refused admission to the bar for exercising their constitutionally guaranteed rights to freedom of speech, peaceable assembly and petition for redress of grievances. Since they were likewise entirely aware that the Constitution contains Article V, providing for amendment, we will similarly not suppose they intended admission to be refused to applicants who advocate amendment, even very radical amendment, by lawful means. Accepting defendants' construction, as we do, we could hold Rule 9406 to be invalid on its face only if the Constitution makes it impermissible to give any scrutiny to whether an applicant can honestly take a lawfully required oath.

We do not read Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), as prohibiting all inquiry to that end. The Court there recognized that the state need not seat a legislator who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." 385 U.S. at 132, 87 S.Ct. at 347. If the state may consider declarations or manifestations made con-

temporaneously with the taking of the oath, by the same token it may make a reasonable inquiry whether the oath taker is not in fact engaging in a solemn farce. The holding was rather that the information gathered by the special committee of the Georgia legislature had no sufficient tendency to negate Mr. Bond's position that he could conscientiously take the oath.

We therefore hold that Rule 9406 is not unconstitutional if implemented in accordance with its purpose. Before we proceed to plaintiffs' contentions concerning the questionnaires for its application prescribed by the Committees on Character and Fitness for the First and Second Departments, we must consider whether that subject is appropriate for adjudication by a court of three judges, 28 U.S.C. § 2281, or should be remitted to a single district judge.

IV.

The relevant statute, 28 U.S.C. § 2281, instructs, in "deceptively simple" terms, see Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 114 (2 Cir.), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The defendants apparently concede that a court of three judges would be required if the character committees of

all four judicial departments had prescribed the same questionnaire, or even if they had prescribed different ones but all were here attacked on similar grounds. The concession is well made since, apart from other possible bases for applicability of the statute, the attack would be upon "an order made by an administrative board or commission acting under [State] statutes," cf. Lathrop v. Donohue, 367 U.S. 820, 824-827, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (court order integrating state bar a "statute" within 28 U.S.C. § 1257), and it has long been settled that the ineptness of the 1913 amendment, 37 Stat. 1013, which added the reference to administrative orders but neglected to alter correspondingly the words "upon the ground of the unconstitutionality of such statute" should be overlooked. Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 292, 43 S.Ct. 353, 67 L.Ed. 659 (1923). But defendants contend that since the questionnaires under attack cover only two of the four departments, the case comes within the judge-made exception to § 2281 excluding controversies not of statewide importance. See Ex parte Collins, 277 U.S. 565, 567-569, 48 S.Ct. 585, 72 L.Ed. 990 (1928); Ex parte Public Nat'l Bank, 278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202 (1928); Wilentz v. Sovereign Camp, 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994 (1939); Rorick v. Board of Com'rs, 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242 (1939); Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); Hatfield v. Bailleaux, 290 F.2d 632 (9 Cir. 1961); D. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi.L.Rev. 1, 31-34, 55 (1964); D. Currie, Federal Courts 535-37 (1968).

We disagree for several reasons, any one of which would suffice:

The first ground lies in the difference between an attack on the order of an administrator as such and on the statute as applied by him. The distinction admittedly is elusive since, on the one hand, as said in Phillips v. United States,

312 U.S. 246, 252, 61 S.Ct. 480, 484, 85 L.Ed. 800 (1941), "some constitutional or statutory provision is the ultimate source of all actions by state officials," and, on the other, no statute is self-enforcing. Whatever the difficulties of articulation, there is still a perceptible difference between a challenge to a governor's "single, unique exercise" of power, 312 U.S. at 253, 61 S.Ct. at 484, under a statute of unquestioned validity empowering him generally to call out the national guard in case of war or "any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary," and the continuing administrative implementation of a statute, itself under attack, which is constitutional if applied in one way and not if in another. To put the point in a slightly different way, if the administrator is interpreting legislative policy, even a local application requires three judges; if he is making policy under a delegation, his local action can be tested by a single judge. See for further discussion Sardino v. Federal Reserve Bank, *supra,* 361 F.2d at 115; D. Currie, *supra,* 32 U.Chi.L.Rev. at 37-55; D. Currie, Federal Courts 534-35 (1968).

The second ground is that the actions of the two character committees under authority of the appellate divisions are not truly "local" within the teaching of the cases we have cited. It is true that the regulations of the committee in each department bear directly only on applicants who, being residents there, are seeking admission through the process established for them. But the effect of admission or denial is state-wide; admission in one department is the key to lawful practice throughout the State.

Thirdly, even if the questionnaires should properly be regarded as local administrative action, we would nevertheless retain jurisdiction as a three-judge court. The Supreme Court, in Louisville & N. R. R. v. Garrett, 231 U.S. 298, 303-304, 34 S.Ct. 48, 58 L.Ed. 229 (1913), expressly upheld the jurisdiction of the three-judge panel over nonconstitutional questions affecting the validity of the orders

also attacked on constitutional grounds. In Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80-81, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960), the Court restated the *Garrett* holding in an approving dictum, while deciding that the joinder of a nonconstitutional claim did not obviate the need for three judges on the constitutional one itself. Although both *Garrett* and *Lime Growers* concerned nonconstitutional attacks upon the same statute or order whose constitutional challenge required three judges, the same reasoning should apply when one attack is on the statute and the other on an order issued thereunder. In either case the overlap of evidence and argument is likely to be considerable. The policy of efficient use of judicial effort was pushed much further than this in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16L.Ed.2d 218 (1966), where there was an encroachment upon state interests in determining issues not independently within federal cognizance. Since some issues raised by the complaints plainly call for three judges, there is not the compelling argument for judicial economy that exists when dissolution of the panel at the outset would save the energies of the two judges relieved from further duty. Furthermore to consign the questionnaires to a single judge would entail the prospect of separate appeals, one to the Supreme Court and the other to the Court of Appeals.

In Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), the Supreme Court entertained an appeal from three judges in a case we cannot distinguish from our own. The calling of three judges were there upheld because the plaintiff attacked the passport statute on the ground of unconstitutional delegation; the court below and the Supreme Court both considered, in addition, the contention that the Secretary of State's regulations under that statute were invalid. Perceiving the situation before it as no different from where the additional claim is a nonconstitutional at-

tack on the same statute, the Supreme Court quoted from *Lime Growers* to establish that joining claims not themselves within the three-judge statutes does not dispense with the need for three judges for the consideration of all. See also Kurland, The Romero Case and Some Problems of Federal Jurisdiction, 73 Harv.L.Rev. 817, 838-45 (1960).

Finally, even if all the foregoing grounds should be wrong, and of course we do not think they are, we would nevertheless, in the exercise of discretion, continue to act together as regards the questionnaires. "Although a single district judge is without power to act in a case requiring three judges, the opposite is not true." Swift & Co. v. Wickham, 230 F.Supp. 398, 410 (S.D.N.Y. 1964), appeal dismissed for want of jurisdiction, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), aff'd, 364 F.2d 241 (2 Cir. 1966), cert. denied, 385 U.S. 1036, 87 S.Ct. 776, 17 L.Ed.2d 683 (1967). When the three-judge court has heard the entire case and lack of jurisdiction over one issue is at best debatable, sound policy calls for the three judges to decide that also, since a return of the issue to a single judge "would result in an invalid order if the return was erroneous, whereas the only consequence of erroneous retention of jurisdiction by the three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court, an uncertainty against which the plaintiffs may protect themselves by timely appeals to both courts." *Id.*

V.

The questionnaires in use in the two departments have been the subject of recent changes which demonstrate that the Committees on Character and Fitness and the Justices of the Appellate Divisions are well aware of the need to bring them in line with developing concepts of First Amendment rights. The complaint in 68 Civ. 2938 attacked ques-

tionnaires issued to plaintiffs Wexler and Kaimowitz early in 1968 but these had been altered by the two departments in May before the actions were brought. After the commencement of the actions the appellate divisions deleted questions, set forth in the margin,[6] which would have raised exceedingly serious problems under Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). See also Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968).

The questions to which most strenuous objection is made are the following:

> 26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ———— If your answer is in the affirmative, state the facts below.
>
> 27(a) Do you believe in the principles underlying the form of government of the United States of America?
> ————

[6] "28(a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social service? ———— If so, state fully.

"(b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college, indicate approximate amount of time spent and responsibility involved.

"29(a) Give the names, addresses, objects and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges."

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States? ————

Taking these in reverse order, we fail to see what valid objection can be made to question 27(b). This differs from the New York Constitutional oath sustained in Knight v. Board of Regents, *supra*, 269 F.Supp. 339, aff'd, 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812, only in the inclusion of two additional phrases, "without any mental reservation" and a declaration of loyalty. The former phrase is included in the oaths all of us have taken as judges, and we cannot perceive any proper reason why any applicant for admission to the bar should cavil over it. We likewise find it impossible to see why requiring a future lawyer to declare his loyalty to the Constitution should be deemed objectionable when a promise to support it is not.[7] The suggestion that a prospective lawyer would fear that a declaration of loyalty to the Constitution would prevent his criticizing acts of the Government does not require discussion.

Question 27(a) is alleged to be impermissibly vague. It is claimed, for example, that an applicant might think he could not respond in the affirmative if he did not believe in the electoral college or a bicameral legislature. There is enough substance to this objection that we think the question should be eliminated or altered. The phrase "principles underlying the form of government," as distinguished from the simpler phrase used by Rule 9406 in addressing the appellate divisions and the committees, might be understood by an applicant to include many "principles" of a lower order than the essentials, democratic government and change by lawful methods. One who favored drastic reforms, albeit through constitutional means, might perhaps

[7] See also the oath which the Constitution requires of the President to "preserve, protect and defend" it. Art. II, § 1.

feel unable conscientiously to answer with a simple "yes"; yet the format of the question affords no additional space for explanation and the word "principles" is so vague as to create a problem even if opportunity for explanation were afforded. The question thus may share the defect of the oath in Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967), which the Supreme Court found capable of being read to require the affiant to disclaim any desire to "alter" the government by peaceful "revolution." It seems unnecessary to require such an imprecise declaration from an applicant for admission to the bar. Defendants say the question is intended merely to be "subsidiary to and supportive of" the constitutional oath; while we have held that the state can permissibly make some inquiry into the applicant's ability sincerely to take the oath, this purpose can be served by more circumscribed questions, such as 27(b) and the various factual questions contained throughout the questionnaires. Question 27(a) should thus be deleted or rephrased to remove the imprecision we have noted.

Question 26 also raises a difficult problem. Plaintiffs rely on cases such as *Baggett, Elfbrandt,* and *Keyishian,* cited in section III of this opinion, and also on Shelton v. Tucker, *supra,* 364 U.S. 479, 81 S.Ct. 247, and Schneider v. Smith, *supra,* 390 U.S. 17, 88 S.Ct. 682. Defendants distinguish the former as involving statutes that set up a bar to employment or decreed a termination of it, all in the field of teaching where the First Amendment dictates "particular concern for the safeguarding of academic freedom," Haskett v. Washington, *supra,* as contrasted to the mere inquiry here. They distinguish *Shelton* and *Schneider* upon the breadth of the questions asked. Defendants assert in the first instance that the principle remains sound that in order to protect "some interest clearly within the sphere of governmental concern" a state may "deny positions to persons supposed to be dangerous because the position might be used to the

detriment of the public." Speiser v. Randall, *supra,* 357 U.S. at 527, 78 S.Ct. at 1343. In Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1961), for example, the Court sustained a requirement that a candidate for public office swear that he was not engaged " 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." Further, although what is within the state's power of exclusion is necessarily within its power of inquiry, defendants argue that the latter is broader since the state is entitled to information from which it may develop that a person has in fact engaged in conduct justifying a bar to office that he has not been willing to admit. With respect to the scope of inquiry, Question 26 does not approach the requirement struck down in *Shelton* that every associational tie be disclosed, a requirement the Court held to be too indiscriminate in its sweep. The decisions in Beilan v. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1444 (1958); Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423 (1958); Nelson v. County of Los Angeles, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494 (1960); Konigsberg v. State Bar of California, *supra,* 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 and In re Anastaplo, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961), demonstrate that the Constitution does not prohibit a state from *asking* a public official or a candidate for admission to the bar whether he was ever a member of the Communist Party or, as in the *Nelson* case, of other organizations known to the member to advocate violent overthrow of the government.

The most obvious problems with Question 26 are the parenthetical past-tense verbs. While the draftsman probably intended these to relate to the period of the applicant's membership, this is not made clear; the question could be read as requiring an applicant to report membership in an

organization that advocated overthrow of the Government of the United States in 1860 but now would defend every syllable of the Constitution. The question should be corrected to clarify that the organization's teaching or advocacy of violent overthrow must have coincided in time with applicant's membership—a correction to which we cannot conceive the defendants would object. The next issue is whether the question must be further limited to cases where the applicant knew of the teaching or advocacy. Defendants do not assert they could constitutionally exclude applicants unless this was shown; their contention is rather, as noted above, that they should be permitted to frame their inquiry more broadly, that an applicant making an affirmative answer will be free to qualify this, and that the committees and the appellate divisions will then be in a position to determine the truth of the disclaimers. While there is force in this, no Supreme Court decision has gone beyond sustaining inquiry into membership in organizations known to the member to advocate forceful or violent overthrow, or in the Communist Party whose advocacy is evidently deemed a matter of common knowledge. We are not disposed to sanction inquiries of greater scope. Although Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957), could be distinguished as involving a sweeping legislative inquiry not limited to public employees or applicants for admission to the bar, it indicates the Court's aversion to questions concerning associations in the absence of *scienter*. The prospect of having to respond to an inquiry like Question 26 might have a deterring effect on exercise of the constitutionally protected right of association, and this can be justified only when "the subordinating interest of the State" is "compelling," Sweezy v. New Hampshire, *supra*, 354 U.S. at 265, 77 S.Ct. at 1219 (concurring opinion of Frankfurter, J.)—a test applied in Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960) and NAACP v. Button, 371 U.S. 415, 439, 83 S.Ct. 328, 9 L.Ed.2d

405 (1963). The state's interest in informing itself of the prior associations of candidates for the bar with subversive organizations can be adequately protected by a question more narrowly phrased. See Nelson v. County of Los Angeles, *supra*, 362 U.S. at 2-3 & n. 1, 80 S.Ct. 527.

Plaintiffs also attack Question 31. In the First Department this reads:

> Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? —— ——— If your answer is "Yes" state the facts.

In the Second Department the words "favorable or" are omitted. Plaintiffs contend that this catch-all has a serious *in terrorem* effect, especially in light of the directions at the head of the application:

> 1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.

We agree. The committees and the appellate divisions should be able to frame specific questions adequate to elicit the information they need; indeed they have demonstrated in the 31 other questions what plaintiffs consider an excessive ability in that regard. We find no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life demanded by Question 31.[8]

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[8] At the argument before us, David W. Peck, Esq., former Presiding Justice of the Appellate Division for the First Department, who appeared as counsel for the character committees, while contending Question 31 to be innocuous, expressed personal dislike for it and the opinion that there would not "be any great to-do about question 31."

We take a different view with respect to the last question requiring discussion in the text of this opinion:

> 32. (a) Have you read the Canons of Ethics adpoted by the American and New York State Bar Associations? ————
>
> (b) Will you conscientiously endeavor to conform your professional conduct to them? ————

The objection is to (b); plaintiffs contend that an applicant may conscientiously disagree with various Canons, which currently are being revised, and still deserve admission to the bar. We agree with that position but not with the conclusion plaintiffs draw from it. There is no vagueness here of the sort we found in Question 27(a); an applicant who has read the Canons knows just what standards he is being asked about. If he dissents from a particular Canon, he need only say so and explain why. We have been cited no evidence that such dissent on a reasoned basis would bar admission.

Finally, plaintiffs attack generally the practice of the committees of conducting individual personal interviews with applicants, at which, among other things, questions are posed "on the basis of the applicant's answers to the questionnaire." Plaintiffs allege that the scope of this questioning is sometimes so broad as to constitute an unwarranted invasion into the applicant's personal and political privacy. We do not understand plaintiffs to deny that a personal interview can be a permissible and very helpful aid to the committees in judging fitness for admission to the bar. Rather, their complaint goes to the scope of interviews conducted at a time when the questionnaires included inquiries since deleted or here disapproved by us. We have no reason to assume that as the scope of the committees' written in-

uiry is contracted, there will not be a similar adjustment n the focus of their spoken questions.[9]

VI.

We must now consider the appropriate disposition in light f the foregoing discussion. While we have power to issue n injunction against use of the questionnaires until Ques- ions 26, 27(a) and 31 are omitted or rephrased and against esumption of use of the questions that have been discon- inued, see, e.g., fn. 6, we find no immediate occasion for

[9] Plaintiffs also challenge Questions 19-22, which call for informa- ion concerning the applicant's registration for Selective Service, re- ection for and discharge from military service, and charges or com- plaints during military service. We do not understand plaintiffs to leny that all these are matters of public record, which, however, the committees could obtain only at great trouble and expense. It is not unreasonable for them to save this expense by drawing upon the ap- plicant's personal knowledge. In reply briefs plaintiffs complain of a requirement, allegedly made by the Committee on Character and Fitness of the Second Department, that an applicant authorize the Clerk of his Local Board to allow members and staff of the Com- mittee and the Appellate Division to have unrestricted access to his entire file. Although we would entertain considerable doubt about the propriety of this, we have not passed upon it since it was not al- leged in the complaints or affidavits.

The complaints do raise question about the committees' require- ment that applicants obtain and submit affidavits from third persons attesting to their good moral character. The forms of these affidavits have recently undergone radical curtailment. The First Department's current form says nothing about home visits by the affiant, and the Second Department's does not require the affiant to aver that he has visited the applicant's home but merely to say whether or not he has. While the latter provision is asserted to be an invasion of the appli- cant's personal privacy forbidden by Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and Camaro v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), those cases are so remote from the issue as not to warrant discussion.

doing so. Although "the court's power to grant injunctive relief survives discontinuance of the illegal conduct," United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953), a court is not required to award it, as that case demonstrates. Counsel for the character committees emphasized at the argument that "these State Courts are not stiff-necked about this thing." Considerations of comity to respected fellow-judges suggest they should be afforded a reasonable opportunity to reflect on our conclusions and perhaps take action that may obviate any occasion for an injunction. Law students will not suffer any serious chill during this brief interval, when the ultimate result is so clear. We believe also that if the three plaintiffs who have passed the examinations and have refused to fill out the questionnaires should decline to answer Questions 27(a) and 31 and answer Question 26 only as limited to membership in organizations known to them to be then teaching or advocating overthrow of the Government by force or violence, they would not find obstacles in their way; if our expectation should prove unfounded, they may apply to us for relief.

We shall therefore hold all motions until such date, not later than ninety days from the entry of this opinion, when counsel for the defendants shall report in writing what action, if any, the appellate divisions have taken. Such report shall be served upon plaintiffs' counsel; within twenty days thereafter, they may, if so advised, serve and file appropriate papers with respect to what further relief, if any, they deem required; the defendants shall answer within fifteen days. If counsel desire an opportunity for further argument, we will assign a date.

It is so ordered.

MOTLEY, District Judge (concurring in part, dissenting in part.)

In these consolidated cases plaintiffs challenge, on First and Fourteenth Amendment grounds, certain New York

statutes which contain the criteria for determining eligibility for admission to the bar.[1] One of these statutes provides that an applicant shall be admitted if the admitting court is satisfied that he "possesses the character and general fitness requisite for an attorney and counselor-at-law." New York Judiciary Law, § 90. The second statute provides that the applicant shall be admitted if, in addition, he has "furnished satisfactory proof to the effect that he believes in the form of government of the United States and is loyal to such government." New York Civil Practice Law and Rules, Rule 9406. These statutes are attacked on the ground that they are unconstitutionally vague and broad, resulting in a chilling effect upon the exercise of First Amendment freedoms by law students and those awaiting admission to the bar after having passed the written examination required. This judge, applying the concepts of vagueness and broadness holds: 1) the first statute is constitutional, but its interpretation, implementation and application by the defendant courts and their respective character committees is unconstitutional; and 2) the second statute is unconstitutional on its face and as interpreted, implemented and applied by defendants.

There is a rule of the New York Court of Appeals which implements the first statute by providing that every applicant must produce before the character committee and file with it "evidence that he possesses the *good moral character* and general fitness requisite for" an attorney.[2] [Emphasis Added.] This must be shown by the affidavits of two

[1] The New York statutory and regulatory provisions and procedures governing admission to the bar are similar to those in most other states. See generally Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) and Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957).

[2] New York Judiciary Law, Appendix, Rule VIII-1, Rules of the New York Court of Appeals for Admission of Attorneys.

reputable persons residing in the city or county in which the applicant resides, one of whom must be a practising attorney.[3] According to the rule, the affidavits "must state that the applicant is, to the knowledge of the affiant, a person of *good moral character* and must set forth in detail the facts upon which such knowledge is based."[4] [Emphasis Added]. The term "good moral character" is not defined. The rule further provides that such "affidavits *shall not be conclusive,* and the [admitting court] may make further examination and inquiry through its Committee on Character and Fitness or otherwise."[5] [Emphasis Added]. Finally, the rule provides that the admitting courts, which are the four appellate divisions of the New York Supreme Court, shall adopt such additional rules as they may deem fit with respect to the requirement that the applicant prove his good moral character and general fitness.[6]

I. *Statement of the Facts*

In order to recognize the full dimensions of the constitutional issues posed here, it is necessary to examine closely the manner in which the foregoing statutes and rules were interpreted, implemented and applied by the appellate divisions which are defendants here and their respective character committees. To implement the Court of Appeals rule, defendants prepared instructions for persons furnishing affidavits and the affidavit forms, copies of which are

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[3] *Id.*

[4] *Id.* Rule VIII-2.

[5] *Id.*

[6] *Id.* Rule VIII-4. This rule reads:

"The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

attached to the original and amended complaints in the second action. The First Department's instructions advised affiants that their affidavits must "state that to the knowledge (or in the opinion) of the affiant the applicant is a person of good moral character", and must set forth "in detail the facts upon which affiant's knowledge of or opinion as to applicant's moral character is based." There is no definition of "good moral character" and the language of the statute, "character and general fitness requisite for an attorney and counsellor-at-law", is not used. The instructions additionally advised: "Affidavits covering home life should characterize family and home environment." There is no further amplification of this instruction. The Second Department combined its instructions with the affidavit form and entitled it: "Form for Affidavit of Character and Home Life." The affidavit form contained a series of questions to be answered by the affiants. These questions demonstrate the unconstitutionally vague and broad manner in which the first statute, Judiciary Law § 90, and the Court of Appeals Rule VIII was interpreted, implemented and applied by defendants. The exemplars are as follows:

> 7. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the *particular activities* should be specified.
>
> 9. What is your conclusion as to applicant's *moral* character? (Reserve details for next question)
>
> 10. Set forth in detail what you have *personally observed* in your associations with applicant which

leads you to the onclusion set forth under question 9, specifying, among other things, the moral qualities and perscal traits observed in applicant's conduct, and his sual attitude toward those with whom he associate.

11. Have you isited applicant's

(a) parental hcne;

(b) marital hoie, if any;

(c) any other bme or place of abode applicant may have had

(answer "Yes"or "No" to each subdivision).

12. (a) How oten, approximately, during each week, month or yer, have you visited the parental, marital or other hoie or place of abode of applicant?

("Frequently"or "often" or other indefinite statement is not asatisfactory answer. Note that in most cases visis will be less frequent than the contacts mentionedin Q. 8, above).

(b) During wht years (stating approximate dates)?

(c) At what adcresses (listing them specifically)?

(d) Do such viits still continue? If not, when did they cease, andfor what reason?

13. Have you a such visits met and conversed with:

(a) Applicant;

(b) The membes of his family or household? If not with all, with hich members?

14. (a) With hat persons has the applicant lived during each priod of your association with him in his home?

(If during period or periods covered by answer, applicant has lived with family, enumerate the members of the family during each period. If, during any period of association, he has lived apart from his family, enumerate the persons, if any, with whom he has lived during each such period.)

(b) With what persons does he live at the present time, if that be known to you?

15. Set forth in detail what you have *personally observed* as to the moral qualities and conduct of the members of applicant's family or other persons with whom he has lived:

(a) in parental home;

(b) in marital home, if any;

(c) in any other home or place of abode applicant may have had.

16. What do you say of applicant's conduct towards the members of his family or household during each period of your association with him in his home, and at present, if association still continues? (Give full details).

17. State fully any other facts within your knowledge, *or of which you have information*, which in your opinion have any bearing on the applicant's moral character or fitness to practise law, or which would be helpful to the Committee in determining the applicant's character and fitness. [Emphasis Added].

After these actions were filed, these affidavit forms and the instructions were changed. The First Department's form was greatly shortened and has omitted the instructions

regarding affidavits covering home life but asks the affiant to state:

> "6. Length and nature of affiant's acquaintance with applicant:
>
> (a) Residence of applicant;
>
> (b) Persons with whom applicant lives (if known to affiant).
>
> 7. Affiant's conclusions as to applicant's moral character:
>
> 8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based.

Again, the term "moral character" is not defined and the statutory language is not incorporated.

The Second Department has changed the title of its form to read: "Form for Affidavit of Character and Residence." It has omitted some of the above questions but still requests the following information:

> "5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the particular activities should be specified.
>
> 7. What is your conclusion as to applicant's moral character? (Reserve details for next question).
>
> 8. State in detail the facts upon which your knowledge or opinion as to applicant's character is based.

9. Have you visited applicant's

(a) parental home;

(b) marital home, if any;

(c) any other home or place of abode applicant may have had?

10. How often have you visited the parental, marital or other home or place of abode of applicant?

("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)

Missing from this form, again, is any definition of the terms "moral character" and the statutory language is not referred to therein.

In addition to the character affidavits, each judicial department, as authorized, has appointed a committee for the purpose of making an investigation.[7] Each committee is known as the Committee on Character and Fitness of the particular department. To enable the committee to make its investigation, another statute authorizes the committee, subject to the approval of the justices of the appellate division, "to prescribe and from time to time amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the Committee and the appellate division justices."[8] Two other statutes must be noted at this juncture. One provides that, "[u]nless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is

[7] New York Civil Practice Law and Rules, Rule 9401.

[8] *Id.* Rule 9404.

entitled to admission."[9] The other statute is the second statute referred to initially which provides that, "[n]o person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney * * *, unless he shall furnish satisfactory proof to the effect * * * that he believes in the form of the government of the United States and is loyal to such government."[10]

In accordance with the foregoing statutory mandates, defendants have prepared application forms. These forms, known as the "Questionnaire and Statement", presently contain 32 questions, all of which must be answered unless otherwise indicated. In addition, "every question and every part of each question must be answered, even though the answer be negative." The application form admonishes the applicant: "This is a statement made under oath." The applicant is further warned that, "failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law."

There are two application forms involved in these actions; one form is that used by the Committee on Character and Fitness of the First Department and the other by the Second Department's Committee. When the complaints in these actions were filed, these forms, unknown to plaintiffs, had just been amended in May 1968. Some of the questions objected to in the original complaints had been either deleted or changed. In June 1968, just prior to the filing of these suits, the First Department had already begun to distribute its amended form. After these actions were filed, the Second Department began to distribute its

[9] *Id.*

[10] *Id.* Rule 9406.

mended form to applicants. After the filing of these com-laints, still other questions originally objected to were eleted from the amended forms.[11] The net effect of these hanges and deletions, however, is to leave unchanged the 'irst and Fourteenth Amendment challenge to the statutes. 'The substance of the statutory and regulatory complex emains and from the outset * * * [plaintiffs'] basic claim as been that they are aggrieved by its application." Keyi-hian v. Board of Regents of Unversity of State of New 'ork, 385 U.S. 589, 596, 87 S.Ct. 675, 680, 17 L.Ed.2d 629 1967). See also, Dombrowski v. Pfister, 380 U.S. 479, 85 .Ct. 1116, 14 L.Ed.2d 22 (1965).

In the original forms, questions 19, 20 and 21 of the 'irst Department's form and questions 32 and 36 of the ther were specifically objected to on First and Fourteenth mendment grounds. Once again, the full flavor of the con-titutional assault cannot be appreciated without a close crutiny of how the committees interpreted and set about heir task of implementing and applying the two basic stat-tes containing the criteria for admission to the bar. The ollowing questions attest the "danger of tolerating, in the rea of First Amendment freedoms, the existence of a * * * regulatory] statute [i. e. C.P.L.R. 9406] susceptible of weeping and improper application" NAACP v. Button, 71 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); Dombrowski v. Pfister, supra.

First Department

19. (A) Are there any favorable or unfavorable incidents in your life, whether at school, college, law school, business or otherwise, not called for by the questions contained in this questionnaire or disclosed in your answers thereto?

[11] The first action was filed July 16, 1968 and the second action he next day.

If so, list them.

20. Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?

If so, state fully.

21. (A) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member.

Second Department

32. Have you written any articles for publication?

If so, give the circumstances, the name of publication, the date of publication and the title and subject matter of the article. (Include information relative to any articles for publication in any school or college paper or magazine.)

36. (A) Are you now, or have you ever been at any time (including the time during which you attended high school, college and law school, and including the time during which you engaged in military service or any community activity) a member of any club, association, society or organization or *political party?* [Emphasis Added].

(B) If answer be yes, give the name, address and objects of each and every such club, association, society or organization or party and state the period of your membership and your position or title therein.

Questions 22 and 23 of the First Department's form and question 35 of the other were also objected to by plaintiffs.

These questions read:

First Department

22. (A) Are you now or have you ever been a member of *or affiliated in any way* with any of the organizations or groups listed as subversive by the Attorney General of the United States? [Emphasis Added].

(B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?

If your answer is yes to either subdivision of this question, give the following information:

Name and address of organization or group * * *

When you became a member or affiliated with it * * *

Period of your association or connection with it * * *

How and why you became associated or connected with it * * *

How and why you severed your connection with it, if you did * * *

23. Have you ever participated *in any way whatsoever* in the activities of such organizations or groups? [Emphasis added].

If so, to what extent.

Second Department

35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

(b) Are you now or have you ever been a member of any party or organization created for such pur-

pose or for the propagandizing or the furtherance thereof?

(c) If answer is yes, state the name of the party or organization.

(d) Are you now, or have you ever been, a member of the Communist Party, or have you ever been enrolled as a member of the Communist Party?

The oaths prescribed by question 24 of the First Department's form and questions 33 and 34 of the other were objected to also. The First Department's question, which was virtually identical with the Second Department's question read:

24. (A) Do you believe in the principles underlying the form of government of the United States? * * * State on a rider, in not less than 100 words, what you believe those principles to be. (Handwritten)

(B) Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to the Government of the United States? * * *

The June 1968 amended forms deleted the following questions, *supra:* 19B, 20, 21(a) (First Department) and 32 and 36 (Second Department). The amended forms revised the remaining First Department questions as follows:

Question 19(A) was revised to read:

"31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is "Yes" state the facts.

No time limit is specified as to this question.

Question 21(B) was revised to read:

"29. (b) Have you ever been disciplined, expelled, suspended, or ordered to resign from any club, association, society or organization? If your answer is "Yes", state the facts.

Again, no time limitation is given.

Questions 22(A) and (B) and 23 were revised to read:

"26. Have you ever organized or helped to organize or become a member of *or participated in any way whatsoever* in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means?

If your answer is in the affirmative, state the facts below. [Emphasis Added].

Questions 24(A) and (B) were revised to read:

"27. (a) Do you believe in the principles underlying the form of government of the United States of America?

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to *and ready to support the Constitution of the United States?* [Emphasis Added].

The amended forms revised the remaining Second Department questions as follows: Questions 33 and 34 (principles underlying form of government and loyalty) were revised to read as the First Department's question 27, immediately *supra,* and questions 35 (pledged to aid change in form of government) was revised to read as the First

Department's question 26, *supra,* immediately preceding question 27.

After the suits were commenced and after the June 1968 amended forms had been distributed, in a tacit confession of error, defendants advised the court that the following questions had been deleted from both amended forms:

> 28. (a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?
>
> If so, state fully.
>
> (b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college indicate approximate amount of time spent and responsibility involved.
>
> 29. (a) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges.

In addition to the affidavits of good moral character and complete answers to questions in the Questionnaire and Statement, applicants, as a matter of practice, must appear for a personal interview before a member of the Committee on Character and Fitness. During the course of these interviews, applicants, as authorized by Court of Appeals Rule VIII-2, are questioned further about their "good moral character and general fitness", based upon the affidavits and answers on the Questionnaire and Statement. Plaintiffs alleged that these interviews often involve inquiry into the applicant's political activities, speeches, beliefs and conduct of a personal and private nature. Only a general denial of these allegations has been made in the

answers filed by defendants and no other denial of the validity of these allegations has been presented.

It also is essential to a full understanding of the constitutional claims made here to know who it is who challenges these statutes and why such challenge is made. In this connection we must know who the plaintiffs are and why they are here.

Plaintiffs in the first case are the Law Students Civil Rights Research Council, Inc. and three law students. The organizational plaintiff is a non-profit membership corporation organized under the laws of the District of Columbia with principal offices in New York City. Its principal objectives are: 1) "non-partisan research, study and analysis of the law with a view to eliminate prejudice and discrimination; to defend human and civil rights secured by law; and to make public the conclusions reached through such research"; and 2) to "provide a civil rights program where students may study with and assist members of the legal profession in the civil rights field on behalf of indigent, poor and distressed, or underprivileged litigants on civil rights cases."[12] The membership of the Council consists of law students, approximately 1500, in 60 law schools throughout the country. There are chapters of the organization in the City of New York at the law schools of Brooklyn College, Columbia, Fordham, and New York Universities. Membership in these chapters includes persons who are residents of either the First or Second Judicial Department and who have either applied for or intend to apply for membership in the New York Bar in those departments. The Council sues on behalf of these members. The complaint alleges that the work of the organization can succeed only if law students may freely engage in the organization's activities, uninhibited by the fear of subsequent delay in or denial of admission to practice because of prior

[12] Second Amended Complaint, paragraph 3.

involvement with the organization or its activities. The individual plaintiffs are all law students who plan to apply for admission to the New York State Bar upon graduation from law school.

Plaintiffs in the companion case are three individuals who have taken and passed the written examination required of all applicants for admision to the New York bar and two organizational plaintiffs. Two of the individual plaintiffs reside in the First Judicial Department and one resides in the Second Judicial Department. Two of these individuals have never been arrested and have never been suspended or dismissed from any school or university. One has never been suspended or dismissed from any school or university, but he has been arrested for distributing handbills in Albany, Georgia in the summer of 1963. Two of the plaintiffs are graduates of New York University Law School and one is a graduate of the Columbia University School of Law. One is presently an assistant professor of law at Columbia. Another plaintiff is a member of the staff of the Columbia University Center on Social Welfare Policy and Law. One has a master's degree in law.

The Columbia Law Students Guild, one of the organizational plaintiffs, includes law students attending Columbia University School of Law who have not yet graduated from law school and who have not yet taken steps to gain admission to the bar other than their pursuit of the required law studies. These students intend to apply for admission to the bar upon completing law school. The organization also includes students who have completed law school and who have applied for admission to the bar. The other organizational plaintiff includes in its membership law students from the various law schools in New York City. It is a chapter of the National Lawyers Guild. Both organizational plaintiffs are non-profit organizations devoted in the main to the promotion of law reform, facilitation of the

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administration of justice, and the protection and fostering of civil rights and liberties.

But, more specifically, as related to the issues raised in this case, the Law Students Guild actively seeks to involve its members in the work of civil rights, civil liberties, and poverty organizations. The National Lawyers Guild, with which both organizational plaintiffs are affiliated, adopted a resolution at its national convention in July 1968 "which places particular emphasis on the concern of lawyers with the war in Vietnam, the draft, racism, and the crises of the poverty and the urban ghettos." [13] It is alleged in the complaint that the New York Chapter "seeks solution to these problems through a radical change in the structure of the nation's legal, political and economic system." [14] It is further alleged that in connection with these objectives, the members of the New York Chapter "have engaged and will engage in many activities not traditionally undertaken by other bar associations." [15] As in the first action, the complaint alleges that these organizations can succeed in their program objectives only if law students feel free to engage in such activities uninhibited by the fear of subsequent delay or denial of admission to practice because of affiliation with these organizations. Both of these organizations likewise sue on behalf of their members who have applied or who will be applying for admission to the bar.

All three organizational plaintiffs have the same standing to sue on behalf of their members as that found in the case on which they rely. N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). A close look at plaintiffs makes clear that they are not concerned here with whether a law student who has stolen money from his employer or who has murdered his mother may, nevertheless, be admitted to the bar. They are plainly concerned

[13] Amended Complaint paragraph 7b.

[14] *Id.*

[15] *Id.*

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with whether political tests may be employed in determining eligibility.

Plaintiffs have moved for summary judgment. Defendants have answered and have moved to dismiss. There is no genuine issue as to any material fact alleged in the complaint, including the questions used by the respective character committees prior to and at the time the suits were filed and the questionnaires as amended and revised since the institution of these actions. Plaintiffs are entitled to judgment as a matter of law and, consequently, to the injunction they seek. Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (6th Cir. 1956), cert. den. 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868; Henry v. Greenville Airport Commission, 284 F.2d 631 (4th Cir. 1960); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

II. *The First Statute*

On the merits of the questions which the court finds dispositive of this case, plaintiffs must prevail.[16] If plaintiffs

[16] Plaintiffs also claim that: 1) the personal interview and character affidavits regarding home life which are required violate rights secured by the Fourth, Fifth, Ninth and Fourteenth Amendments; 2) the oaths required and disclosures compelled violate the Fifth and Fourteenth Amendments; 3) the statutes, rules and regulations and practices violate the Sixth and Fourteenth Amendments' guarantee of the right to the effective assistance of counsel and the independence of the bar; 4) the admission procedures do not comply with due process of law guaranteed by the Fourteenth Amendment in that they permit denial or delay of admission to the bar without providing for notice of charges, a full hearing at which counsel may be present, an opportunity for confrontation and cross examination, and specification of findings. The latter claim was made, in the main, in Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). Plaintiffs claim that defendants have not taken any action to comply with the *Willner* decision. That case held defendants' procedures lacking in due process since they failed to provide applicant with a hearing on the reasons for denial of his admission. Although defendants did not reply to this serious charge, it seems that a determination of this issue should await a case in which the procedural due process issue is clearly raised by the facts.

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had brought these cases a decade or more ago, i.e., prior to the first Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), it is doubtful they could have found sufficient precedent with which to convince a court of the validity of their claims.[17] Today, however, a decade after Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed2d 796 (1957) and the first *Konigsberg* case, in which the identical issues lurked, plaintiffs' briefs sparkle with the jewel-like precedents of the intervening years in clearly analogous contexts. Waving their First Amendment freedoms on high—especially freedom to believe what one will, freedom of association, and the right to privacy in one's home—plaintiffs carry the banner for lawyers to have the same protection against state infringement upon these areas as has been won for public employees (especially teachers), Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Keyishian v. Board of Regents, supra, Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967); other licensed professions such as merchant seaman, Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968); Negroes, NAACP v. Button, *supra,* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); NAACP v. Alabama, *supra;* other civil rights advocates, Dombrowski v. Pfister, *supra;* Communists, Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d. 992 (1964); veterans, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2

[17] Note, Inquiries Into The Political Beliefs and Activities of Applicants For Admission To The Bar, 1 Colum. Survey of Hum. Rts. L. 33, 45 (1967-1968).

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L.Ed.2d. 1460 (1958); and the population in general, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The first statute, attacked by plaintiffs on the grounds of vagueness and broadness, provides that an applicant who has passed the written examination should be admitted to the bar if the appellate division to which he has applied "shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor at law."

In the second *Konigsberg* case, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961) the good moral character standard was again involved as it had been in the *Schware* case and the first *Konigsberg* case, *supra*. In none of these cases, however, was the "good moral character" standard, *per se*, drawn into question as it is here on the grounds of vagueness and broadness. And since that time, the concepts of vagueness and broadness have not yet been applied by the Supreme Court to this standard or any other bar admission standard as they have been applied recently to statutes and oaths required of persons seeking public licenses or employment or assuming public office. Schneider v. Smith, *supra*; Cramp v. Board of Public Instruction, *supra*; Baggett v. Bullitt, *supra*; Elfbrandt v. Russell, *supra*; Keyishian v. Board of Regents, *supra*; Whitehill v. Elkins, *supra*.

In the second *Konigsberg* case, *supra*, 366 U.S. at 40, 81 S.Ct. at 1001, Mr. Justice Harlan, writing for the majority, pointed out that the validity of the requirement that an applicant for admission to the bar bear the burden of proof of "good moral character" had not been drawn into question there. He also noted that the requirement could not "well be drawn in question", citing the fact that such a requirement exists in all the states. But there was drawn in question the right of the state to put upon an applicant the burden of proving that he had not advocated

the overthrow of government by force and violence. In this connection, Mr. Justice Harlan pointed out that Konigsberg did not challenge the constitutionality of the California statute which forbade certification for admission to the bar of those who so advocated. The majority held, however, that the burden of proof on this issue had not been put upon applicants but upon the state and that in this connection an applicant could not obstruct a committee's inquiry into lawful standards of admission by refusing to answer questions. Konigsberg had refused to answer the question whether he had been a member of the Communist Party on the ground that the First Amendment protected him in his refusal to answer, although he swore that he had never advocated the overthrow of government by force. The majority disagreed with Konigsberg's First Amendment claim. Using a balancing test, the majority held that "the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, was clearly sufficient to outweigh the minimal effect upon free association" occasioned by the compulsory disclosure of political party membership in that case.

We, therefore, review here for the first time the moral character standard and the other bar admission standards involved here in the light of the vagueness and broadness concepts which the high Court has applied to other First Amendment cases since the second *Konigsberg* case, without reference to the obstruction rule or the balancing test used there.

The term "good moral character" has not been defined by the New York courts and counsel for defendants have not offered any definition. The term "general fitness" has been defined in only one case as follows: "* * * the words 'general fitness' have rather to do with a man's general experience in life, his family life, his associates,

his business or other experience, his general reputation and the like." Application of Brennan, 230 App. Div. 218, 227, 243 N.Y.S. 705, 715 (2nd Dept. 1930). And in one case it does appear that an applicant was disqualified on political grounds, *inter alia,* pursuant to the "general fitness" criterion, Application of Cassidy, 268 App.Div. 282, 51 N.Y.S. 2d 202 (2nd Dept. 1944). In that case, the applicant was an anti-communist who urged the creation of private armies to combat communism.

Even the Supreme Court in the first *Konigsberg* case, *supra,* and in *Schware, supra,* did not agree upon the meaning of the words "good moral character". There the Court acknowledged that this "unusually ambiguous" standard, "can be defined in an almost unlimited number of ways" and can be "a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." 353 U.S. at 263, 77 S.Ct. at 728. In the first *Konigsberg* case, the Court assumed, without deciding, for the purposes of that case that the proper definition was the one proposed by the state's counsel, i. e., "honesty, fairness and respect for the rights of others and for the laws of the state and nation," 353 U.S. at 264, 77 S.Ct. at 728. The Court took pains to point out that "neither the definition [of good moral character] proposed by counsel nor those appearing in the California cases equates unorthodox political beliefs or membership in lawful political parties with bad moral character." 353 U.S. at 263-264, 77 S.Ct. at 728. The Court also pointed out that the California cases appeared to define " 'good moral character' in terms of an absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude' " 353 U.S. at 263, 77 S.Ct. at 728. Mr. Justice Frankfurter, however, in his concurring opinion in *Schware, supra,* offered this definition: "From a profession charged with such responsibilities there must be

exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have throughout the centuries, been compendiously described as 'moral character.'" 353 U.S. at 247, 77 S.Ct. at 761. These definitions are, obviously, still subject to attack on vagueness grounds, but they at least define some of those qualities which might be demanded of lawyers.[18] Professor Walter Gellhorn of Columbia Law School has suggested that the standard for assessing the character of bar applicants be "dishonorable conduct relevant to the occupation" rather than good "moral" character.[19] The few New York cases in which applicants have been rejected on character grounds lend support to Mr. Justice Frankfurter's as well as Professor Gellhorn's view.[20]

In any event, it seems clear that a statutory framework which requires as a standard for admission to the bar that applicants possess the "character and general fitness requisite for an attorney", although vague, is not so vague, in the light of the foregoing definitions and its long and

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[18] *Id.* at page 40.

[19] W. Gellhorn, Individual Freedom and Governmental Restraint 150 (1956).

[20] In the cases decided by the New York courts in which applicants have been barred, it is clear that in each the conduct made the basis for refusal to admit has been dishonorable conduct relevant to the legal profession: e.g. Re Peters, 221 App.Div. 607, 225 N.Y.S. 144, aff'd 250 N.Y. 595, 166 N.E. 337, rearg. denied, 252 N.Y. 572, 170 N.E. 148 (1927) (admission denied because of disbarment in another state); Re Greenblatt, 253 App.Div. 391, 2 N.Y.S.2d 569 (1938) (admission denied because of misrepresentations to character committee about applicant's dismissal from college for misconduct); Application of Cassidy, 268 App.Div. 282, 51 N.Y.S.2d 202, aff'd on rehearing, 270 App.Div. 1046, 63 N.Y.S.2d 840, aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1944) (admission denied because applicant urged creation of armed units for forceful overthrow of government and made inconsistent statements indicating lack of veracity).

proper application in many cases, as to be unconstitutional on its face on the ground of vagueness.

We must, therefore, examine the manner in which the good moral character statute has been construed, implemented and applied by the defendant courts and their respective character committees. With the statute and the Court of Appeals Rule VIII as a guide, defendants have adopted vague and overly broad regulations and procedures which have resulted in a broad and sweeping inquiry into the background of bar applicants. These applicants have been required to answer questions which are vague and broad in violation of constitutional rights. cf. Schneider v. Smith, *supra*. As writers have pointed out, the terms vagueness and broadness actually involve three related problems. Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960). A question may leave an applicant guessing as to its meanings. This is referred to as conventional vagueness.[21] Examples of this are revised Question 31, *supra*, which reads: "Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness?"; and revised Question 27(a), *supra*, which reads: "Do you believe in the principles underlying the form of government of the United States of America?" cf. Baggett v. Bullitt, *supra*.

Secondly, a question may ask the applicant for too much information, such as those cited, supra, as having been deleted by defendants, asking for a listing of membership in all organizations and a detailing of activities in each over an indefinite period of years, leaving the person questioned guessing as to the relevance of what is asked. This is one type of broadness.[22] Shelton v. Tucker, *supra*. Another example of this is Question 9 of the Second Depart-

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[21] Note, 1 Colum. Survey of Hum. Rts. L., at [pp. 54-55, *supra*] footnote 16.

[22] *Id.*

ment's present affidavit form: "Have you visited applicant's (a) parental home, (b) marital home, (c) any other home or place of abode applicant may have had?"

Finally, a question may define carefully the information it seeks, such as membership in the Communist Party, but cover both constitutionally protected and unprotected activity; this other type of broadness is sometimes called overbreadth.[23] Such overbreadth applies to present Question 26, *supra*, relating to membership in organizations which advocate overthrow of government by force. Recent Supreme Court decisions make it abundantly clear that neither Communist Party membership or any other membership can be used to deny admission to the bar without a showing that the applicant knows of the organization's unlawful objectives and has joined with or has acquired " 'specific intent' to further the illegal aims of the organization." Elfbrandt v. Russell, *supra*; Keyishian v. Board of Regents, *supra*; cf. Aptheker v. Secretary of State, *supra*; Haskett v. Washington, 294 F.Supp. 912 (D.D.C., Dec. 4, 1968).

Consequently, the regulations adopted by defendants, i.e., the affidavit forms and the questionnaire, fail to meet the standard of precision applicable to state regulations touching upon First Amendment freedoms. The standard was enunciated by the Supreme Court in NAACP v. Button, *supra*, where the Court ruled that "standards of permissible statutory vagueness are strict in the area of free expression," 371 U.S. at 432, 83 S.Ct. at 337, and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 371 U.S. at 438, 83 S.Ct. at 340. More recently, the Court reiterated that ruling in *Keyishian*, by quoting this passage from the *Button* case: "Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

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[23] *Id.*

371 U.S. at 433, 83 S.Ct. at 338. The Court then quoted from another decision in this area which is also singularly applicable here: "When one must guess what conduct or utterances will lose him his position, one necessarily will 'steer far wider of the unlawful zone • • •' Speiser v. Randall, 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460]." 385 U.S. at 604, 87 S.Ct. at 684. For "[t]he threat of sanctions may deter • • • almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. at 433, 83 S.Ct. at 338. See also, United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Dombrowski v. Pfister, *supra;* cf. Aptheker v. Secretary of State, *supra.* Mr. Justice Black's incisive observation in his dissenting opinion in the second *Konigsberg* case is apposite here: "If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission in to the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might possibly be against, including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment." 366 U.S. at 73-74, 81 S.Ct. at 1919.

It is clear from all the questions cited, *supra,* that in applying the statutes attacked here, there has been an improper focus upon the applicant's political beliefs and associations and the improper use of a political test in determining admissions to the bar. Such an unlimited political focus and the use of a political test pursuant to a "good moral character" standard is foreclosed by the Supreme Court's decisions. In *Schware, supra,* the Court said: "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." 353 U.S. at 239, 77 S.Ct. at 756. As the Court there made clear, the focus must be on

the applicant's illegal political activity, if any, and the disqualification must be on this ground, not his political beliefs or associations.

There also has been an improper invasion of the right of privacy. The hallmark of civilization is that when a man closes the door to his home and retreats to the privacy thereof the eyes and ears of the state remain outside. Griswold v. Connecticut, *supra*. The state simply cannot ask every affiant who supports an applicant for admission to the bar with whom the applicant lives or what the inside of his parents' home is like. There must be some specific information relating to those qualities expected of one about to enter the legal professions before these questions can be asked of a particular applicant. Gibson v. Florida Legislative Investigation Committee, *supra*. Of course the state can, as it long has, require of applicants for admission to the bar that they have the "character and general fitness requisite for an attorney and counsellor at law." But these statutory words must be given such definition and application by defendants as will suggest to applicants and affiants "dishonorable conduct relevant to" the legal profession, not invasions of personal privacy and political beliefs and associations protected by the Constitution. As the Court said in Shelton v. Tucker, *supra*, "* * * even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. at 488, 81 S.Ct. at 252. And in *Keyishian*, the Court said: "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [lawyers] what is being proscribed." 385 U.S. at 604, 87 S.Ct. at 684.

This judge, therefore, holds that the "character and general fitness" statute is constitutional, but its inter-

pretation, implementation and application by the defendant courts and their respective character committees are unconstitutional.

III. *The Second Statute*

The second statute attacked here provides that an applicant for admission to the bar must furnish satisfactory proof to the effect that "he believes in the form of government of the United States and is loyal to such government." N.Y.C.P.L.R. Rule 9406. This is clearly a political test for determining admission to the bar in violation of rights secured by the First and Fourteenth Amendment to the federal constitution. cf. Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). The "First Amendment gives freedom of mind the same security as freedom of conscience." Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1944). It is simply too late in our constitutional history to try to reconcile the requirements of Rule 9406 with the constitutional axiom "that one be permitted to believe what he will." American Communications Ass'n v. Douds, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925 (1950). All that Rule 9406 does is "[t]o force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals * * * [and] to humiliate and degrade" the Bar. In re Anastaplo, 366 U.S. 82, 115-116, 81 S.Ct. 978, 996, 6 L.Ed. 2d 135 (1961) (Mr. Justice Black dissenting). It is nothing short of a complete irony that lawyers who fought for and won constitutional protections for other professions are the last to receive protection for themselves.

Rule 9406 is also unconstitutional on its face for another obvious reason. In an area patently involving First Amendment rights where the consequences of failure of proof are severe and the matter to be proved is difficult of definition, the burden of proof is explicitly upon the applicant to prove that he is loyal to the government. Speiser v. Randall, *supra*.

The statute, itself, Rule 9406, says: "No person shall receive said certificate [of character and fitness] from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect: 1) that he believes in the form of government of the United States and is loyal to such government." There is simply no room for the conclusion, which the majority reached in the second *Konigsberg* case, *supra*, that the state has *not* put the burden of proof on the applicant; there it is in plain language not subject to attack on grounds of vagueness. It is clearly not a burden of simply coming forward with some evidence or going forward once the state has made out a prima facie case. Where is that in the statute or evidence before us?

Present Question 26 (relating to membership in organizations advocating overthrow of the government by force) and the present oaths required in the Questionnaire and Statement (relating to the substance of C.P.L.R. 9406) is the method by which this burden is initially put upon the applicant. The answers given to Question 26 and the oaths, which are in the form of yes and no questions, may lead to further questioning upon the personal interview. This has never been seriously denied by defendants and is clearly authorized by the requirement that an investigation be made. N.Y.C.P.L.R., Rule 9401. Consequently, in this case, as in Speiser v. Randall, *supra*, more is involved than the taking of a conclusive oath of

non-criminal political conduct such as was involved in the oath cases referred to by the majority here as justification for requiring the second question oath of lawyers. In those cases, the Supreme Court sustained the validity of loyalty oaths required of public employees, Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); candidates for public office, Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1951); and officers of labor unions, American Communication Ass'n v. Douds, *supra*. But, as the majority points out in *Speiser*, "If the person took the oath he retained his position. The oath was not part of a device to shift to the office holder the burden of proving his right to retain his position." *Id.* 357 U.S. at 528, 78 S.Ct. at 1343. Here as in *Speiser*, the answers to questions 26 and the oath questions are "only a step in a process throughout which the [applicant] must bear the burden of proof." *Id.* The applicant may be questioned indefinitely and may be required to produce additional affidavits. In this process, an applicant must obviously defend his negative answer, expose and defend his writings, his speeches, his membership in various organizations and his political beliefs.

The procedures here do not involve a standard of proof which would require the character committees to go forward to prove disqualification on grounds of illegal political activity once the applicant has made a prima facie case. The committee may delay its interrogation indefinitely or deny admission altogether, as the Questionnaire and Statement warn, for failure to answer fully any question.

Defendants, in their brief, do not even make an attempt to dull the luster of one of plaintiffs' brightest gems, Speiser v. Randall, *supra*; for there is the heart of plaintiffs' case. Questions relating to loyalty to the government

clearly tread upon First Amendment territory. Consequently, as the Court said in *Speiser*, "Where the transcendant value of speech is involved due process certainly requires in the circumstances of this case that the State bear the burden of persuasion" to show that the applicant is guilty of illegal political conduct. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." 357 U.S. at 526, 78 S.Ct. at 1342.

The burden of proving loyalty to the government here, as in *Speiser*, can have but one effect on a prospective lawyer's First Amendment freedoms, and that is a chilling effect if not a freezing one. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526, 78 S.Ct. at 1342. See also Elfbrandt v. Russell, *supra*, 384 U.S. at 17-18, 86 S.Ct. 1238, and Abington School District v. Schempp, 374 U.S. 203, 289-290, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). (Mr. Justice Brennan concurring). Moreover, a person who must spend long years in preparation and invest large sums of money to enter the legal profession is clearly going to be more prone "to steer far wider of the unlawful zone."

Here an applicant for admission to the bar has the burden of proving that he is loyal to the government. If in the opinion of some members of the character committee he should fail in this burden, he is denied the requisite certificate. This means that the applicant is denied the opportunity to enter the profession for which he has spent large sums of money and much time in study. "So far as I am concerned the consequences to the applicant whether considered from a financial standpoint, a

social standpoint, or any other standpoint I can think of, constitute a more serious 'penalty' than that imposed upon Speiser," Konigsberg v. State Bar of California, *supra*, 366 U.S. at 77, 81 S.Ct. at 1021, Mr. Justice Black dissenting.

If, as in *Speiser*, the state cannot constitutionally impose upon a veteran seeking a tax exemption the burden of proving loyalty to our government, by what reasoning can the state constitutionally impose such burden on one seeking a license to practice law? Defendants did not answer this question to the satisfaction of this court and did not cite any case to sustain their position other than the second *Konigsberg* case where the Court explicitly found the burden was not on the applicant.

Finally, Rule 9406 is likewise unconstitutional on its face since it lacks sufficient standards for determining who shall be admitted to the bar. It has that same quality of "extraordinary ambiguity" condemned by the Court in describing the statutory framework in *Keyishian, supra*, 385 U.S. at 604, 87 S.Ct. 675. There vague statutory language was held unconstitutional. One statute required the discharge of a teacher for "the utterance of any treasonable or seditious acts or words or the doing of any treasonable or seditious act", *Id.* at 593, 87 S.Ct. at 678. Another statute barred persons from employment as teachers who "by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. *Id.* at 599, 87 S.Ct. at 682. The language of Rule 9406 is equally vague. The language of Rule 9406 is "wholly lacking in 'terms susceptible of objective measurement.'" *Id.* at 604, 87 S.Ct. at 684. And "men of common intelligence must necessarily guess at its meaning and differ as to its application * * *." Baggett v. Bullitt, *supra*, 377 U.S. at 367, 84 S.Ct. at 1320. The words "loyal to such govern-

ment" are no more definite than the phrase " 'respect for * * * the institutions of the United States of America * * * and undivided allegiance to the government * * *' " found lacking in ascertainable standards in *Baggett*. *Id.* at 361, 84 S.Ct. at 1317.

Pursuant to this vague statute, defendants require applicants on the Questionnaire and Statement to answer these questions: "Do you believe in the principles underlying the form of government of the United States of America? Can you conscientiously, and do you, affirm that you are, without any mental reservation, *loyal to and ready to support the Constitution of the United States?*" The italicized words constitute the amended portion of this oath. This amendment was made just prior to the filing of these actions. This second question formerly read: "Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to the Government of the United States?" The first question was also amended to delete the requirement that the applicant write, in not less than 100 words, what he believes those principles underlying our form of government to be. These amendments, however, do not rescue these oaths from the stamp of unconstitutionality.

These questions are oaths for purposes of perjury under New York law. Under the law, oath includes an affirmation N.Y. Penal Law, McKinney's Consol. Laws, c. 40, § 210.00. When an applicant answers the second question in the affirmative he has unquestionably taken an oath. Moreover, applicants are warned that the statement is one made under oath. Consequently, when the applicant answers the first question, *supra*, and then swears or affirms at the end of the Questionnaire and Statement, as required, to the truth of his affirmative answer, the applicant has taken an oath to which the penalties for perjury attach, the same as in Whitehill v. Elkins, *supra*, and Elfbrandt v. Russell, *supra*.

If the oath required in Whitehill v. Elkins, *supra*, ("I am not engaged in one way or another in the attempt to overthrow the government of the United States") is constitutionally unacceptable for teachers because too vague and broad when read in the light of the membership statute to which it was tied; and if the oath in Baggett v. Bullitt, *supra*, ("I will * * * promote respect for the flag and the institutions of the United States * * * and undivided allegiance to the government") cannot constitutionally be required of teachers because it is also vague and broad; and if the oath required of teachers in Cramp v. Board of Public Instruction, *supra* ("I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party") is likewise vague and broad; pursuant to what rationale shall lawyers be required to take the vague and broad oaths here? It has been suggested that there is none and that there is more reason for applying generous First Amendment standards in bar admission cases than in public employment cases.[24] The most important reason is that teachers, for example, are employees of the state while lawyers are employed by their clients to whom they owe their first obligation. This difference would seem to justify greater regulation of teachers than lawyers. Lawyers are officers of the court only in the sense that they are subject to the discipline of the court and are under an obligation not to hinder the administration of justice. Teachers and other public employees are employed directly by the state which thus has the added interest of an employer. The majority here holds that lawyers are in a special category and may, therefore, be required to take an oath such as those upheld as to "a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety." *Garner, supra*;

[24] *Id.* at 52.

Gerende, supra; American Communications Ass'n, *supra.* But the majority pointed out in Speiser v. Randall, *supra,* that in those cases there was no attempt directly to control speech, as in the instant case, but rather to protect, from some evil shown to be grave, some interest clearly within the sphere of governmental concern. What danger to the public is actually created by a "subversive" lawyer? Again, this question has been thoroughly examined.[25] The conclusion is that the danger is small and that, in any event, adequate remedies in the form of criminal penalties and disbarment already exist to punish and deter irresponsible conduct.

Finally, it seems clear that a determination as to the vagueness and broadness of these oath questions must be undertaken as a necessary requisite to any consideration of the obstruction by an applicant of the investigative process by refusing to answer these oath questions. cf. Whitehill v. Elkins, *supra.* Rule 9406's language, "loyal to such government" and the first question's language, "principles underlying the form of government" are certainly broad enough to encompass constitutionally protected dissent and protest activity against certain governmental policies and principles. There has been no attempt by statute, rule, regulation, or court decision to enlighten anyone as to what utterances or what activities may be construed as disloyalty to our government or contrary to the principles underlying our form of government. Clearly, law students who dissent from this government's policies with respect to the war in Vietnam have a ground for concern as to whether they are loyal to the government. "It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on 'those with a conscience and scrupulous regard for such undertakings.'" *Keyishian, supra,* 385 U.S. at 599, 87 S.Ct. at 681.

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[25] *Id.* at 40.

As to the oaths embodied in the two questions, defendants argue that examination of the New York statutory scheme discloses that both the Legislature and the Court of Appeals treat members of the bar as officers of the courts who, as such, are required to take the constitutional oath of office. Accordingly, say defendants, the requirements of C.P.L.R. 9406, that a person shall not be admitted to the bar unless he furnishes "satisfactory proof to the effect that he believes in the form of government of the United States and is loyal to such government" must be construed in harmony with its purpose, i.e., to test merely that the applicant, if approved, can truly and honestly take the constitutional oath of office. Thus, defendants plead, C.P.L.R. 9406 may not be deemed to be either vague or unconstitutional; it merely requires, in substance, that a law officer-to-be affirm that he believes in and is loyal to our constitutional form of government the same as any judge or other state officer.

In reply, plaintiffs' points are exceedingly apt. First, there is no attack made here upon the requirement that every person upon being admitted to the bar take the promissory oath given to all state officers to support the state and federal constitutions which is required by the New York Constitution, Article XIII, § 1. New York Judiciary Law § 466.[26]

Secondly, plaintiffs say that the attempt to save these vague oaths as to belief by assimilation with the constitutional oath of office cannot succeed. The fact is that the authority to prescribe these oaths derives from C.P.L.R. 9406 which is a statutory prerequiste for admission to the

[26] "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ....., according to the best of my ability." N.Y.Const., Art. XIII, § 1.

bar and, consequently, must be considered with reference thereto and not with reference to the Constitutional oath already required of lawyers and to which plaintiffs do not object. Even if we accept defendants' contention that C.P.L.R. 9406 and these oaths must be construed in light of the constitutional oath, as the Court said in Whitehill v. Elkins, *supra*, 389 U.S. at 61-62, 88 S.Ct. at 187 the statute and these oaths are still "befogged". We find here, as the Court found there, "an overbreadth [discussed supra] that makes possible oppressive or capricious application" as character committee personnel and appellate division justices change. That very threat may deter the unfettered exercise of First Amendment freedoms by law students as much as successive suits for perjury. This statute and these oaths are just another classic example of the often cited need for legislation drawn with precision in this sensitive and important First Amendment area. cf. Whitehill v. Elkins, *supra*.

The distinction between promissory oath and test oath of the kind here involved was recognized long ago. Ex parte Garland, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866). The oaths involved here are not promissory oaths to support the Constitution of the State and the United States as in the case of the constitutional oath. The fact that these oaths are in the form of "yes" and "no" questions is of special significance. If the applicant does not give the desired answer, which in this case is "yes", he may be questioned further, delayed in his admission, or disqualified without further questioning. He is warned of this on the front of the Questionnaire and Statement. In short, he must carry the burden of proof that he is qualified for admission. These oaths are not simply a promise to support the Constitution. These are oaths which require an applicant to disclaim past or present constitutionally protected political beliefs or activities. It is for this reason, i.e.,

that these oaths are too vague and too broad, that they cannot be equated with the constitutional oath.

Finally, plaintiffs "strike home" with another gem out of their storehouse of recent precedent, Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). There the state had claimed, as here, the right to examine the officer-to-be to test his sincerity and ability to take the constitutional oath there prescribed. The Court ruled in response to this claim in the *Bond* case, at 132, 87 S.Ct. at 347, that such a power could not be conceded because of its obvious susceptibility to abuse which it went on to demonstrate. Again, the Court made clear that there must be some specific evidence of the prospective officer's inability to take the oath before any such inquiry becomes proper. It simply cannot be done in every case.

APPENDIX D

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 2917

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs,

against

LOWELL WADMOND, *et al.*,
Defendants.

68 Civ. 2938

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs,

against

THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, First Judicial Department, *et al.*,
Defendants.

The plaintiffs in 68 Civ. 2917, Law Students Civil Rights Research Council, Inc., *et al.*, having commenced an action on their own behalf and, pursuant to Rule 23, F.R.C.P., on behalf of all others similarly situated, seeking declaratory and injunctive relief against the enforcement of Statutes and Rules of the State of New York delegating to the defendants Supreme Court of the State of New York, Appellate Division, First Judicial Department and the Com-

mittee on Character and Fitness appointed by it, the authority to examine and certify persons qualifying for admission to the Bar of the State of New York, and plaintiffs having challenged the application of such Statutes and Rules as embodied in the form of Questionnaires and oral interviews conducted by said Court and Committee, and plaintiffs Law Students Civil Rights Research Council, Inc., *et al.*, having moved for convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 and for a declaratory judgment and a preliminary and permanent injunction on the grounds that the New York Statutes and Rules, on their face and as applied, violated the plaintiffs' rights under the Fourteenth Amendment to the United States Constitution; and

Plaintiffs in 68 Civ. 2938, Stephen Martin Wexler, *et al.*, having commenced an action seeking declaratory and injunctive relief against the defendants Supreme Courts of the State of New York, Appellate Divisions, First and Second Judicial Departments and the Committees on Character and Fitness thereof, contending that the State Statutes and Rules empowering the defendant Courts and their Committees to establish procedures for applications for admission to the New York State Bar were vague and overbroad in violation to the Fourteenth Amendment, and that the New York Statutes and Rules as applied by the defendant Courts and Committees, in the written Questionnaires promulgated by them and in the personal interviews conducted of applicants, were unconstitutional as written and as applied; and said plaintiffs having moved for the convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 and for a preliminary injunction and declaratory judgment; and

Honorable Constance Baker Motley, District Judge, on September 25, 1968 having granted plaintiffs' separate motions to convene a three-judge court, and this Court

having convened for argument of the respective motions by plaintiffs on November 13, 1968, at which time the above actions were consolidated; and

Defendants having moved to dismiss the complaints on the grounds that this Court lacked jurisdiction over the persons of the defendants, and over the subject matter of these actions, and the defendants having contended that this three-judge court was not properly convened, and the defendants having moved to dismiss the complaints for failure to establish a claim under the United States Constitution or under Federal Law; and

This Court having rendered its opinion on February 17, 1969, holding that it did have jurisdiction to reach the merits of the claims asserted in the complaints, and holding further that the Statutes and Rules challenged in these actions were and are constitutional on their face but that certain questions then being utilized in the Questionnaires were inconsistent with the Fourteenth Amendment to the Constitution of the United States; and the defendants having been directed to file a report within ninety (90) days after the rendering of this Court's decision setting forth the steps taken to implement that decision; and the defendants having filed a report dated May 14, 1969, hereto annexed, setting forth changes which have been adopted in the form of Questionnaire; it is finally ORDERED, ADJUDGED AND DECREED (1) That this Court was properly convened and has jurisdiction over the subject matter of this action and over the persons of the defendants;

(2) That the New York State Statutes and Rules delegating power to the Supreme Courts, Appellate Divisions and their respective Committees on Character and Fitness to administer admissions to the New York Bar do not violate the Fourteenth Amendment to the United States Constitution on their face;

(3) That Question 27(a) as revised in said report dated May 14, 1969, be further revised to read as follows:

> "Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain."

(4) That the motions of plaintiffs and defendants are granted to the extent herein provided and are otherwise denied;

(5) That no party shall recover costs against any other; and

(6) That this decree is without prejudice to any new action relating to the manner in which the aforesaid procedures are carried out.

Dated: New York, New York
June 16, 1969

HENRY J. FRIENDLY
U.S.C.J.

DUDLEY B. BONSAL
U.S. D.J.

While dissenting in certain respects from the court's opinion, I sign the decree as properly carrying it out.

CONSTANCE BAKER MOTLEY
U.S. D.J.

Filed:
June , 1969

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Clerk

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~696~~ 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,
Defendants-Appellees.

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 696

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,

Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,

Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,

Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,

Defendants-Appellees.

MOTION TO AFFIRM

The Appellees, comprising the Supreme Court of the State of New York, Appellate Division, First and Second Judicial Departments, the judges thereof, the Committees on Character and Fitness of those Departments, and the members thereof, move for summary affirmance of the

judgment entered on June 16, 1969 by the Statutory Court of the United States District Court for the Southern District of New York (Friendly, Cir. J.; Bonsal and Motley, D.JJ.).

Jurisdiction

These two actions, commenced in July, 1968, were ordered to be heard before a statutory District Court of three judges pursuant to 28 U.S.C. § 2281 (see 5a-13a),* since the complaints sought an injunction prohibiting the enforcement, on constitutional grounds, of New York statutes and rules.

On November 13, 1968 a hearing was held before a three-judge court, consisting of Circuit Judge Henry J. Friendly and District Judges Dudley B. Bonsal and Constance Baker Motley. At that time the two actions were consolidated for hearing, and argument was heard on the plaintiffs' motion for a temporary and permanent injunction and defendants' motion to dismiss the complaints.

In an opinion filed on February 17, 1969 (14a-78a) the District Court concluded that the statutes and rules under attack were constitutional on their face as construed by the New York Courts, except that three questions then contained in the questionnaire submitted to applicants for admission to the Bar were defective in certain respects. The Court deferred entering judgment for 90 days in order to give the defendant New York Courts an opportunity to review the opinion and submit a statement as to the changes being contemplated in the form of questionnaire. That report was submitted on May 14, 1969 (R. Doc. No. 24) and thereafter final judgment was entered on June 16, 1969 (79a-82a).

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* Reference to pages followed by "a" are to the appendix to the Jurisdictional Statement.

A notice of appeal to this Court was filed by appellants on August 8, 1969 and the Jurisdictional Statement was received by appellees on October 6, 1969. This motion is being filed within 30 days, on November 5, 1969.

Statutes and Rules Involved

The basic framework of New York's procedures governing admission to the Bar is contained in the statutes and rules involved in this appeal.

Section 90 of the New York Judiciary Law (quoted at 2a-3a) provides that the Appellate Divisions of the New York Supreme Court shall admit individuals who have been certified by the state board of law examiners as having passed a written examination, after the responsible Appellate Division is satisfied that the applicant "possesses the character and general fitness requisite for an attorney and counsellor-at-law".

This mandate is implemented by the Rules of the New York Court of Appeals governing admission of attorneys, particularly Rule VIII (quoted at 3a-4a). That Rule requires an applicant to produce before a Committee on Character and Fitness, appointed by the Appellate Division, affidavits of two persons attesting that the applicant possesses "the good moral character and general fitness requisite for an attorney and counselor-at-law", and that such affidavits shall contain the opinion by the affiants of the applicant's good moral character and the facts upon which such opinion is based.

The New York Civil Practice Law and Rules, in Rules 9401, 9404 and 9406 (quoted at 1a-2a) provide for the appointment of a committee of lawyers by each Appellate Division (the Committees on Character and Fitness) "for the purpose of investigating the character and fitness of every applicant for admission" to the Bar. Rule 9404 authorizes these committees, with the approval of the Ap-

pellate Divisions, to proscribe a form of questionnaire to be completed by each applicant, which shall include such data as is necessary for the committees to pass upon the qualification of the applicant, including the applicant's residence in New York.

Rule 9406 provides that no one shall be certified for admission to the New York Bar unless the applicant furnishes satisfactory proof of United States citizenship, New York residence, compliance with the applicable rules governing admission, and "that he believes in the form of the government of the United States and is loyal to such government".

Implementing the delegations and restrictions contained in the foregoing statutes and rules, the Committees on Character and Fitness, and the Appellate Divisions to which they report, have promulgated a form of questionnaire for each judicial department. The form of questionnaire in the first and second judicial departments, whose courts and committees are appellees here, is now uniform. The two questions contained in the questionnaire now involved in this appeal deal with the implementation of the mandate of Rule 9406 concerning belief in and loyalty to the United States government. Those questions read as follows:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> "(b). If your answer to (a) is in the affirmative, did you, during the period of such membership or as-

sociation, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?

"27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitution of the United States and of the State of New York? If there is, please explain.

"(b). Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?"

The questions themselves, involving only applications to the Bar within a local area, and not of state-wide scope, are arguably not themselves involved in this appeal (see, *e.g.*, *Moody* v. *Flowers*, 387 U. S. 97) but the questions are pertinent in construing the meaning and scope of Rule 9406.

Questions Presented

1. May the New York Courts constitutionally impose, as a condition for admission to the Bar, a requirement that applicants demonstrate that they possess "the character and general fitness requisite for an attorney and counsellor-at-law", when such a requirement has existed for many years and has been construed repeatedly by the New York Courts?

2. May the New York Courts, and Committees on Character and Fitness appointed by them, in an attempt to establish whether applicants for admission to the Bar can in good faith take an oath of support to the United States Constitution, inquire as to their affiliation with or-

ganizations advocating the violent overthrow of the United States government, when such inquiry is limited to organizations in which they participated with the specific intent to further such aims?

3. Is a statutory directive to the New York Courts constitutional which directs that no person shall be admitted to the Bar unless "he believes in the form of the government of the United States and is loyal to such government", when the New York Courts have construed this directive merely to require that an applicant answer inquiries concerning his willingness to subscribe to the oath of support for the Constitution?

Statement of Facts

Prior to the commencement of these actions the Appellate Divisions of the First and Second Judicial Departments had substantially altered the forms of questionnaire submitted to applicants, and thus the attacks made in the complaints, and the questionnaires annexed as exhibits to the complaints, were already obsolete. Following the commencement of these actions the defendant Appellate Divisions reviewed the new uniform form of questionnaire and voluntarily eliminated some of the remaining questions.*

The three-judge District Court found that the statutes and rules under attack, as construed by the defendant New York Courts, were constitutional, but the Court did consider three of the questions in the form of questionnaire defective. One question, number 26, has been re-

* The questions eliminated, which asked for a listing of all organizations of which the applicant had been a member (see 32a n. 6), might have involved the issues now before this Court in *Baird* v. *State Bar,* No. 53, and in *In re Stolar,* No. 75. Elimination of those questions removes any overlapping issues between those cases and this appeal.

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drafted to comply with the objections noted by the District Court (35a-37a) and in fact the redrafting gives more specificity to the question than even the District Court required, as is now apparent from question 26(b).

Question 27(a), which dealt with belief in the form of government of the United States, was redrafted by the Appellate Divisions (R. Doc. No. 24), and further revised by the District Court in its judgment (see 82a). Question 31, found defective by the District Court (37a), was deleted without objection by the Appellate Divisions.

The Motion to Affirm Should Be Granted

I

The statutes and rules under attack are claimed to be unconstitutionally broad and vague on their face, or more appropriately, as construed by the New York Courts responsible for their interpretation and administration. No basis exists in the record to consider any attack upon these statutes as applied, since these actions proceeded to judgment merely upon motion for an injunction, without any evidence being submitted other than the contested allegations of the complaints.

Appellants attack Section 90 of the New York Judiciary Law claiming that the phrase "character and general fitness requisite for an attorney and counsellor-at-law" is unconstitutionally vague, and that the requirement of establishing good moral character places an unconstitutional burden of proof upon the applicant.

This Court has already noted that the requirement of good moral character is a basic criterion for admission to the Bar of all States, and that it is a "requirement whose validity is not, nor could well be, drawn in question here." *Konigsberg* v. *State Bar*, 366 U. S. 36, 41. New York has not limited the requirement to "good moral character" but

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has restricted the test to the character requisite for an attorney, giving this phrase specific content and definition over a period of many years in the decisions of its courts. See 22a, 63a n.20.

The argument concerning the burden of proof is specious, since the statute merely requires that the Appellate Division satisfy itself of the character and fitness of each applicant. Rule VIII of the Court of Appeals Rules merely establishes a burden upon an applicant of coming forward with affidavits by two persons who know the applicant sufficiently to attest to his good moral character—a burden which is no less stringent than the requirements for admission to the Bar of this Court, and involving a phrase of greater precision than "private and professional character" contained in Rule 5 of the Rules of this Court.

In the implementation of Section 90 and Rule VIII the necessity for an applicant to demonstrate his good moral character has consistently been treated as a valid condition for admission to the Bar. *Konigsberg* v. *State Bar*, 366 U. S. 36, 42; *Konigsberg* v. *State Bar*, 353 U. S. 252, 262-63; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239; *Matter of New York County Lawyers Assn.*, 4 Misc. 2d 728 (Sup. Ct. 1956), *aff'd*, 3 A. D. 2d 742, *aff'd*, 3 N. Y. 2d 224, *appeal dismissed for want of substantial federal question sub nom. Roeb* v. *New York County Lawyers Assn.*, 355 U. S. 604.

II

Appellants also challenge the provision of Rule 9406 of the New York Civil Practice Law and Rules which mandates that the Committee on Character and Fitness shall not certify a person for admission unless the applicant furnishes satisfactory proof "that he believes in the form of the government of the United States and is loyal to such government." Appellants treat this provision as if it were a statute directed at every applicant, whereas the

Rule is merely a delegation of authority to each of the Committees on Character and Fitness, and the Appellate Divisions to which they report. Whatever vagueness may be found in a mere reading of this Rule is clearly eliminated by the interpretation of that Rule as implemented by the Committee in the questionnaire submitted to each applicant. An individual applicant for admission to the Bar need be concerned only with the specific questions implementing Rule 9406 as set forth in the questionnaire. The questions certainly pass muster as precise and within the permissible scope of the Committee's inquiry.

The mandate of Rule 9406, as interpreted by the New York Courts and by the District Court (26a), constitutes merely a test of whether the applicant can subscribe in good faith to the constitutional oath of office required of attorneys in New York (New York Const., Art. XIII, § 1). That oath has already been upheld by this Court in *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd mem.*, 390 U. S. 36 (1968).

Again, appellants argue that Rule 9406 imposes an unconstitutional burden of proof upon every applicant, although there is no evidence whatsoever in the record to refute the conclusion of the District Court that the burden here is merely one of initially coming forward with some evidence. See 23a.

III

The Jurisdictional Statement focuses almost exclusively upon questions deleted from the form of questionnaire, either before the commencement of these actions or prior to the hearing before the three-judge Court. In fact, the only questions pertinent on this appeal are the revised questions sustained by the District Court in its judgment, both of which deal with the inquiry into the applicant's ability to subscribe to the constitutional oath. This Court has already suggested, in *Bond* v. *Floyd*, 385 U. S. 116, 132, that a State need not accept a *pro forma* oath of sup-

port for the Constitution, and some legitimate inquiry into the good faith of the oath taker is thus appropriate.

The actual oath is administered periodically to classes of applicants in the admission ceremonies conducted before the Appellate Divisions. In order to avoid the difficulty of having one individual demur to the taking of that oath at the very moment prior to admission, the Committees on Character and Fitness and the Appellate Divisions before this Court have proposed two questions, 26 and 27 (*supra*, pp. 4-5) for the purpose of determining the *bona fides* of the applicants in swearing to support the Constitution.

Question 26 is now limited to an inquiry concerning the applicant's affiliation with organizations which he *knew* advocated the violent overthrow of the government, and further limited to situations in which the applicant embraced the specific intention to further those unlawful aims. As so limited, the question meets the standards found lacking by this Court in *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Elfbrandt* v. *Russell*, 381 U. S. 11, and *Aptheker* v. *Secretary of State*, 378 U. S. 500. Unlike those cases, however, here there is no proper claim that an applicant would necessarily be denied admission to the Bar by answering this question in the affirmative, since the Committee might well conclude that specific intent to advocate violent overthrow is still not sufficient absent a showing of imminent lawless action. See *Brandenburg* v. *Ohio*, 395 U. S. 444. In any event, in the absence of any suggestion upon the record that the question as now formulated sweeps within its scope conduct which is constitutionally protected even from inquiry, there is no reason why the judgment of the District Court should not be summarily affirmed.

IV

Finally, question 27 cannot fairly be challenged on the ground of vagueness or overbreadth. Question 27(a) as drafted by the District Court merely asks the applicant

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if there is any reason why he cannot subscribe to an oath supporting the Constitutions of the United States and the State of New York. The Committees on Character and Fitness are obviously entitled to know, in advance of the class admission date, what reason any given applicant might have for refusing to take that oath. The oath itself is of course one that is virtually identical to the oath taken by each member of this Court, by the President of the United States (U. S. Const., Art. II, § 1), and probably by every member of the Bar of every State.

Question 27(b) is nothing more than a repetition of the oath, and no more susceptible to constitutional attack. *Knight* v. *Board of Regents, supra.*

CONCLUSION

The statutory scheme attacked here is clearly permissible under the decisions of this Court, and no reason exists for assuming that the Courts of New York, and the distinguished lawyers appointed by those Courts to serve on the Committees on Character and Fitness, will not implement these procedures in accordance with the decisions of this Court and with due regard for the rights of every applicant. The questions asked of applicants in the First and Second Judicial Departments of New York are precise, unambiguous, and no broader than is absolutely necessary in order to satisfy the New York Courts that each applicant possesses the character and general fitness requisite for an attorney and counselor-at-law of the State of New York.*

---

*Appellants' other attack, namely that the affidavits required of sponsors constitute an invasion of the privacy of applicants, is answered simply by a reading of the affidavits (R. Doc. No. 17). They merely ask for the facts which serve as the basis for the sponsor's conclusion that the applicant is a person of good moral character, and also serve to corroborate the applicant's claim of New York residence.

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The judgment appealed from should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1969

No. 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,

Plaintiffs-Appellants,

v.

LOWELL WADMOND, *et al.*,

Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,

Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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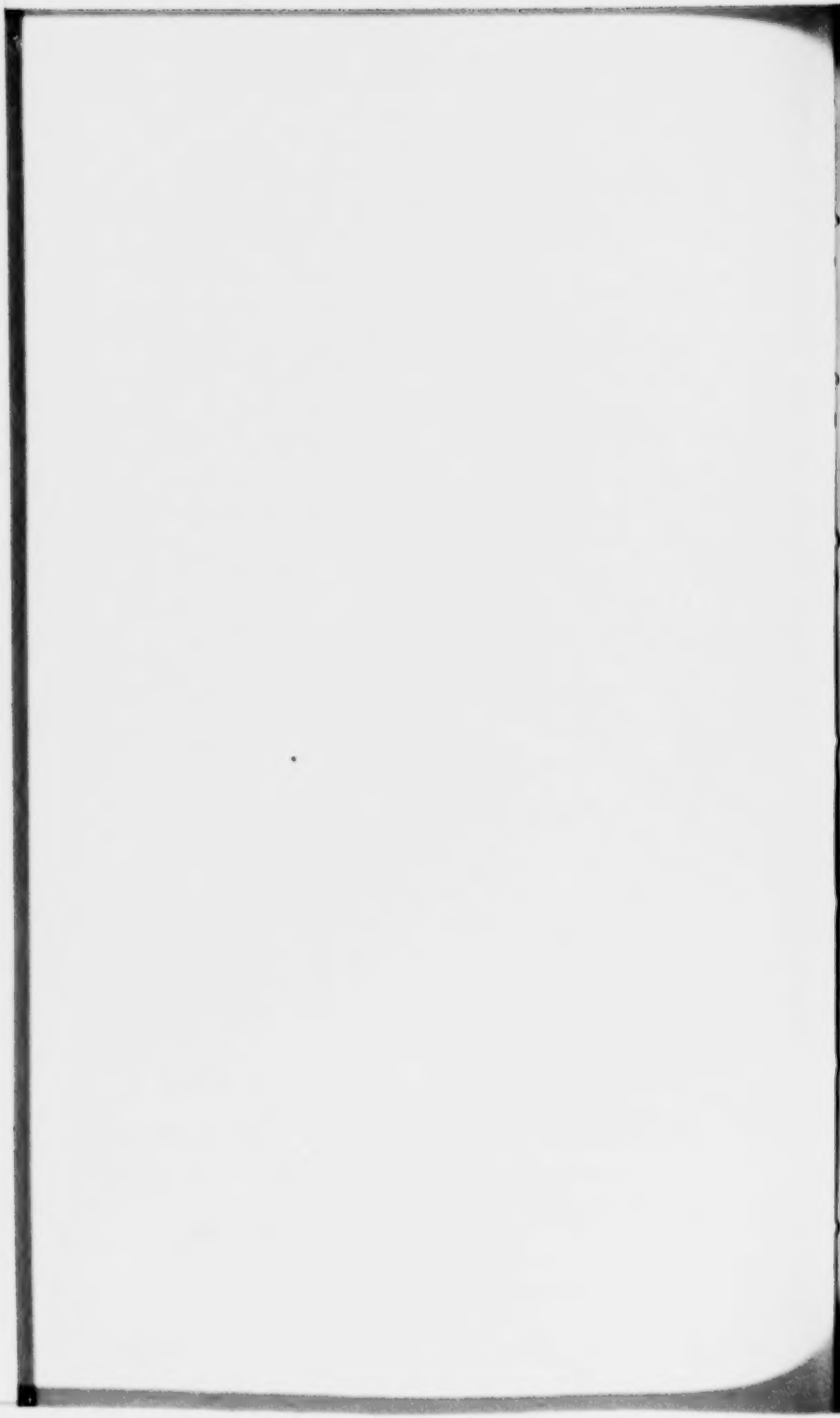

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Supreme Court of the United States

October Term, 1969

No. 696

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,

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SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

The substantiality of the issues raised in this case is evidenced by (i) this Court's pending review of somewhat similar problems in *Baird* v. *State Bar of Arizona*, No. 53, O.T. 1969 and *In the Matter of the Application of Stolar*, No. 75, O.T. 1969, (ii) the dissenting opinion of Judge Motley in the court below, and (iii) appellees' own arguments upon which we comment briefly.

I

Appellees concede, although somewhat equivocally, that the requirements of CPLR 9406(1) that an applicant "furnish satisfactory proof to the effect: (1) that he believes in the form of government of the United States and is loyal to such government" is unconstitutionally vague on its face (Mot. to Aff. p. 9).[1]

This concession was necessitated by the ruling below that the vagueness of an almost identically worded oath[2] appearing in the questionnaire and promulgated on the basis of CPLR 9406(1) deterred the free exercise of First Amendment rights by prospective applicants for admission to the New York Bar. See 33a-34a and discussion in Juris. State. pp. 16-17.

By conceding the vagueness of CPLR 9406(1) appellees necessarily acknowledge the absence of any legitimate statutory basis to sustains questions 26 and 27(a) as revised and question 27(b)[3] and the broad-ranging political

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[1] "Mot. to Aff." refers to the appellees' Motion to Affirm; "Juris. State." refers to appellants' Jurisdictional Statement; "a" refers to pagination of the appendix to the Jurisdictional Statement.

[2] This oath, set forth as Question 27(a) on appellees' questionnaire read as follows: "Do you believe in the principles underlying the form of government of the United States" See 32a.

[3] Question 26 as presently revised reads as follows:

"26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below. (b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the

nquiry which these questions initiate. For this Court has uled explicitly that the state "may not constitutionally equire an individual to disclose his political relationships nd other private affairs "where, as here, such disclosure erves no legitimate purpose." *Barenblatt* v. *United States,* 60 U.S. 109, 127; *NAACP* v. *Alabama,* 357 U.S. 449; *weezy* v. *New Hampshire,* 354 U.S. 234; see also *Stamler* . *Willis,* 415 F. 2d 1365 (7th Cir. 1969).

Appellees' argument that the vagueness of CPLR 406(1) is "eliminated by the interpretation of that Rule s implemented by the Committee in the questionnaire ubmitted to each applicant" (Mot. to Aff. p. 9) must fail or a number of reasons.

1. CPLR 9406(1) is so vague and ambiguous as not to e fairly or reasonably open to a limiting, plausible inter- retation. See *Harrison* v. *NAACP,* 360 U.S. 167, 176; *NAACP* v. *Button,* 371 U.S. 415, 433; *Baggett* v. *Bullitt,* 77 U.S. 360, 378.

2. Appellees' purported narrowing *but unspecified* in- erpretation derives solely from their own, current ques- ionnaire. This recently revised questionnaire, in use in but wo of New York's four judicial departments, is a plainly nsufficient basis upon which to define CPLR 9406(1), ssuming the statute to be susceptible of constitutional

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United States or any State of any political subdivision thereof by force, violence or any unlawful means?"

Question 27(a) as presently revised reads as follows:

"27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain."

Question 27(b) which was upheld in its original form provides:

"(b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?"

definition. This Court has required nothing less than a direct and "authoritative construction" by the state's highest court before entrusting the liberty of individuals to state authorities acting under an apparently vague statutory scheme. See *Harrison* v. *NAACP, supra,* at 138; *NAACP* v. *Button, supra,* at 432; *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 155.[4]

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[4] Appellees' "interpretation" of CPLR 9406(1) is far from the "authoritative construction" required by this Court. Not only is this "interpretation" not binding on the Appellate Divisions for the Third and Fourth Departments (see 15a,n. 1) but as the questionnaires for those departments demonstrate the scope of political inquiry authorized by CPLR 9406(1) is neither clearly defined nor a matter of consensus among the various Appellate Divisions.

Thus, the Third Department questionnaire contains the following political interrogatory: "17. Do you believe in the form of and are you loyal to the Government of the United States?"

This Court may take judicial notice (cf. *Shuttlesworth* v. *Birmingham, supra* at 157) of the Record in the *Stolar* case, *supra,* which includes a copy of the Fourth Department questionnaire, containing the following series of sweeping political inquiries (see the Appendix pp. 23a-24a filed in *In the Matter of the Application of Stolar, supra*):

> "17. State whether there are any favorable or unfavorable incidents in your life, whether at school, college, law school, business, or otherwise, not called for by the questions answered herein or disclosed in your answer thereto? If so, state the facts fully."
>
> "18. State whether you have participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? If so, state the facts fully."
>
> "19. Do you believe in the principles underlying the form of government of the United States?"
>
> "20. State whether you have been or are a member of any party or organization engaged in propagating or pledged to effect changes in the form of government provided for by the United States Constitution, or in advancing the interests of a foreign country? If so, state the facts fully."
>
> "21. Can you conscientiously, and do you affirm, without any

3. Appellees offer no reason why the statute should be nstrued in the light of questions in existence for only six nths, and in disregard of questionnaires used for more n 20 years and of those employed by the Third and urth Departments. See *supra* p. 4, n. 4. Appellees have ther disavowed the validity of these long-standing prac-es, outlined in detail by Judge Motley (43a-54a), nor they give assurances that such practices will not be nstituted. The ephemeral nature of appellees' present nterpretation" is underscored by the conflicting "inter-etations" given CPLR 9406(1) by the various Appellate visions and by the varying formulations which have been vised to replace the oath originally contained in question (a) (see *supra* p. 2, n. 3) declared vague by the court ow. So appellees first offered, as a substitute, an oath worded as follows: "Do you believe in the constitutional rm of government of the United States?" See Juris. ate. p. 11, n. 12. This formulation, too, was rejected by court below. The question presently used is not the pellees' "interpretation" at all, but that of the court low, whose decision is being appealed.

4. Neither the questionnaire generally, which is de-gned solely to obtain information and not to erect a bstantive standard for admission, nor the specific politi- interrogatories, which are themselves under attack for gueness and overbreadth, purport to define the term orm of government", or what is meant by "believes in nd is loyal to such government'." Indeed, the Motion to firm conspicuously fails to discuss any interpretation of ese terms.

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mental reservation, that you have been and are loyal to the government of the United States?"

ne Clerk's office for the Fourth Department, has, by letter and ephone confirmed the fact that these questions are presently in use.

Judge Friendly's findings of "imprecision" with respect to the oath contained in question 27(a) apply with equal force to CPLR 9406(1) (33a-34a). For, as with the oath, there is no reason why applicants who oppose bicameral legislatures, the electoral college or the power of this Court to invalidate Congressional enactments or who are committed to the anarchist, monarchist or communist philosophies will not genuinely fear that their views may be deemed contrary to the belief and loyalty demanded by CPLR 9406(1).

II

CPLR 9406(1) cannot be shielded from the charge of overbreadth by arguing that it "constitutes merely a test of whether the applicant can subscribe in good faith to the constitutional oath of office" (Mot. to Aff. p. 9). See *Bond* v. *Floyd,* 385 U.S. 116; Juris. State. pp. 18-19; 76-78a.

While appellees do not define the "test", it is clear from the express findings in both the majority and dissenting opinions below that CPLR 9406(1) "goes to *belief* at the time of admission" (25a) in "the essentials, democratic government and change by lawful means" (33a) (emphasis added). See also, 26a, 68a. Such a test was correctly condemned by Judge Motley as irreconcilable with the "constitutional axiom 'that one be permitted to believe what he will'. *American Communications Assn.* v. *Douds,* 339, U.S. 382, 412, 70 S. Ct. 674, 691, 946 Ed. 925 (1950)" 68a. See alos *Girouard* v. *United States,* 328 U.S. 61, 68; Juris. State. pp. 17-18.

III

Appellees contend that the "good moral character and general fitness" standard set forth in Jud. L. § 90(1)(a) and Rule VIII (see text at 2a-4a) has been given "specific content and definition" in decisions by New York courts

(Mot. to Aff. p. 8) and is therefore not unconstitutionally vague.

This argument misses the point entirely. Appellants' challenge to the "good moral character and general fitness" standard focuses on its use as a qualification for political fitness. See *Application of Cassidy,* 268 App. Div. 282, 51 N.Y.S. 2d 202 (2d Dept. 1944), *aff'd without opinion* 296 N.Y. 926, 73 N.E. 2d 41 (1945); Brown & Fassett, *Loyalty Tests for Admission to the Bar,* 20 U. of Chi. L. Rev. 480, 496 (1953). Thus, the vagueness in this standard, about which this Court has raised serious questions in *Konigsberg* v. *State Bar,* 353 U.S. 252, 263, cannot be cured by reference to its application in a case involving dishonorable conduct, lack of candor or misrepresentations by an applicant. See Mot. to Aff. p. 8; see also 22a.

Like the statutes invalidated in *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, and *Baggett* v. *Bullitt, supra,* the "good moral character" standard, to the extent that it operates as a political test, creates a license for arbitrary and discriminatory denial of the right to practice law. Appellees' statement that the Committees "might . . . conclude"—the implication being apparent that the Committees do not recognize any obligation—that an applicant who answered question 26 affirmatively should not be denied admission absent a showing of imminent lawless action (Mot. to Aff., p. 10) illustrates the breadth of the power appellees have arrogated to themselves under this standard.

IV

Appellees argue that the requirement of CPLR 9406(1) that an applicant "shall furnish satisfactory proof" of his belief in and loyalty to the form of government of the United States does not unequivocally impose an unconstitutional burden of proof in violation of *Speiser* v. *Randall,*

357 U.S. 513. (Mot. to Aff. p. 9). The argument is untenable in view of the clear wording of the statute and the fact that as to subsections (2) - (4) of CPLR 9406, the phrase "shall furnish satisfactory proof" undeniably places the full burden of proof on the applicant with respect to the qualifications covered by those subsections. See Juris. State. pp. 20-21; 2a, 69a; see also *Application of Schiff*, 163 N.Y.S. 2d 382 (1957); *Application of Kerno*, 1 A.D. 2d 972, 151 N.Y.S. 2d 29 (1956).

Furthermore, appellees' formulation of the "burden" imposed by CPLR 9406(1) as "merely one of initially coming forward with some evidence" (Mot. to Aff. p. 9) is unreal.

First, there is no support for this nebulous construction in decisions of the New York courts or in the views of commentators on the subject. This statute, first enacted in 1921, has always been viewed as an unqualified requirement that the applicant bear the burden of proving his loyalty. See *The Proposed Anti-Communist Oath: New York City Association Votes Against Oath*, 137 A.B.A.J. 124 (1951); Weinstein, Korn, Miller, *New York Civil Practice*, ¶9404.05 (1968).

Second, appellees' failure to elucidate the meaning of the "some evidence" standard and that standard's obvious susceptibility to uneven application in practice raise serious questions of vagueness.

But even assuming that "some evidence" can be equated with a "prima facie case", the requirement still runs afoul of *Speiser* v. *Randall, supra.* Under the reasoning of *Speiser,* there is no rational distinction between compelling an applicant to prove his loyalty, prima facie, a showing which may then be rebutted by the Committee, and to prove his loyalty ultimately. Cf. *Konigsberg* v. *State Bar,* 366 U.S. 36, 40-41 no. 4. No matter how the burden is characterized, the pressures on the law student or applicant to "steer far wider of the unlawful zone" (*Speiser* v.

Randall, supra at 527) are overpowering. That is because he understands that the men before whom he must bring forth "satisfactory proof" of the morality and lawfulness of his political associations and beliefs are men who have his professional reputation and career in their hands and who are very likely to be out of touch with, if not hostile to, contemporary political and social movements. See dissenting views of Justice Traynor in *Konigsberg* v. *State Bar*, 52 Cal. 2d 769, 776, 344 P. 2d 777, 780, 782 (Cal. S. Ct. 1960).

Judge Motley accurately pointed to the burden of proof requirements as the "heart" of the case (70a). This requirement provides the mechanism for appellees' practice of selectively intensifying the political interrogation for those applicants whose political associations and beliefs do not conform to appellees' standard of orthodoxy.[5] Thus, appellees may fasten upon a controversial association or belief disclosed by the applicant or discovered by the Committee's independent investigation as the basis for a find-

[5] Appellees cannot avoid scrutiny of their practices by arguing that the only evidence of these practices was "contested allegations of the complaints". (Mot. to Aff. p. 7). In fact, as Judge Motley points out, "[o]nly a general denial of these allegations has been made in the answers filed by defendants and no other denial of the validity of these allegations has been presented." (54a-a5a).

Moreover, the charge that these practices exist was made in the affidavit submitted by appellants in support of their motion for summary judgment (R. Doc. No. 17); appellees did not offer controverting evidence in their opposing affidavit. (*Ibid.*)

Finally, the practices of the appellees are a matter of common knowledge. See Brown & Fassett, *supra* at 493-494.. The leading commentators on the CPLR have stated that in determining whether an applicant has established his loyalty under CPLR 9406(1) the "applicant may be questioned about his affiliations with any group which might be considered subversive. He must reveal fully his views and past associations." Weinstein, Korn, Miller, *supra* at ¶ 9406.03. Thus, the court below readily presumed the existence of the practices appellants alleged (38a-39a).

ing that the applicant has not *yet* met his burden.[6] As a consequence of such a finding, the applicant is compelled to explain in detail and fully justify these assocations or beliefs in an attempt to exorcise any doubts engendered in the Committee regarding his political fitness. See Weinstein, Korn, Miller, *supra* at ¶ 9406.03. This procedure, with its potential for arbitrary suppression of political liberties, prompted Judge Motley's conclusions that "[t]he burden of proving loyalty here, as in *Speiser*, can have but one effect on a prospective lawyer's First Amendment freedoms; and that is a chilling effect if not a freezing one." (71a, see also 72a).

---

[6] Two recent cases provide a striking illustration of appellant's discriminatory application of the burden of proof requirement.

One involved the appellant Kaimowitz, who submitted his application for admission after the court below rendered its decision. On June 13, 1969 the Committee for the Second Department refused to certify appellant's admission and ordered a further investigation. The basis for its determination was questions raised by (i) appellant's joining several other writers in a strike against their employer, Television Age Magazine, because of differences on editorial policies; (ii) appellants' participation with other summer instructors employed by the Southern Teaching Program sponsored by Yale University in an on-campus, peaceful assembly to protest the educational policies of Bishop College, an all black institution located near Dallas, Texas, to which they were assigned; and (iii) appellants' objection to Canon 16 of the now superseded Canons of Ethics because it required an attorney to terminate his relationship with a client who persists in courtroom misconduct in violation of the Sixh Amendment. Finally, on December 18, 1969, Kaimowitz was admitted by the Appellate Division over the Committee's adverse recommendation.

The second case involved an applicant who was denied a certificate of admission by the Committee for the First Department and ordered to submit to further investigation as a result of a personal interview in which the applicant's disclosure of his participation in anti-war marches prompted the Committee to compel him to state the reasons for his opposition to the war in Vietnam. After a three-month delay, the applicant was admitted. See *Application of Rosenberg* (1st Dept. 1968) (unreported). This case is discussed in Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights, 33, 38 n. 27a (1968).

V

Appellees suggest that in reviewing the breadth of the political and personal investigation authorized by New York's statutory-judicial scheme, this Court should ignore appellees' past, long-standing practices. Nevertheless, appellees refuse to admit that these practices, only recently curtailed (see Juris. State. p. 26, n. 27), were unauthorized or constitutionally invalid and will not be reinstituted in the future. Nor have appellees limited the scope of inquiry involved in the oral interviews. See *supra*, p. 10, n. 6. Accordingly, the statutory-judicial scheme must be read as authorizing the sweeping political and personal investigations appelles have conducted for at least the last 20 years, and is therefore violative of the constitutional requirement of precision (see Juris. State. pp. 30-31).

Even assuming this past history of statutory application did not exist, appellees' rationale for their present practices [questions 26, and 27(a) and (b)] is constitutionally insufficient. According to appellees, applicants are compelled to answer questions 26 and 27(a) and (b) merely "[i]n order to avoid the difficulty of having one individual demur to the taking of . . . [the Constitutional] oath at the very moment prior to admission." (Mot. to Aff. p. 10). Thus, questions 26 and 27(a) and (b) must be held to be invalid under the rulings of this Court prohibiting regulation in the area of First Amendment freedoms in the absence of a compelling or subordinating state purpose. See *Barenblatt* v. *United States, supra; NAACP* v. *Alabama, supra; Gibson* v. *Florida Legislative Committee*, 372 U.S. 539. The interests of appellees' convenience and of the smooth running of their ceremony are hardly sufficient justification for the interference with appellants' freedom of belief and association.

CONCLUSION

The Motion to Affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~696~~ 49

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LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs-Appellants,

—v.—

LOWELL WADMOND, *et al.*,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs-Appellants,

—v.—

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 696

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs-Appellants,

—v.—

LOWELL WADMOND, *et al.*,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs-Appellants,

—v.—

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

Opinions Below

The Opinion of District Judge Motley convening the three-judge statutory court is reported at 291 F. Supp. 772 and is set out in the separate Appendix (A. 106).[1] The

[1] Numbers preceded by "A." refer to pages in the separate Appendix.

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majority opinion of the three-judge court and the partially concurring and partially dissenting opinion of Judge Motley are reported at 299 F. Supp. 117, 133. They are set out at pages A. 143 and A. 169 of the Appendix, respectively.

Jurisdiction

The judgment of the court below was entered on June 16, 1969 and appears in the separate Appendix (A. 225). The Jurisdictional Statement was filed on October 6, 1969. Jurisdiction of this appeal is conferred by 28 U.S.C. §1253.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First, Fourth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. The statutory provisions involved are New York Judiciary Law §90(1)(a), New York Civil Practice Law and Rules, Art. 94, Rules 9401, 9404 and 9406(1) and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-Law, which are set out at pages 1a-4a[2] in the Appendix to this Brief.

Questions Presented

Does the statutory and regulatory scheme by which the admission of applicants to the bar is regulated violate the rights of applicants and potential applicants, under the Constitution, to freedom and privacy of speech, belief and

[2] Numbers followed by "a" refer to the pages in the Appendix to this Brief.

association and freedom from arbitrary government intrusion into their personal affairs, and the rights of the public, particularly racial minorities and those who are politically unpopular, to the effective assistance of counsel, in that

(1) because of its vague and overbroad standards it inquires, through questionnaires and interviews, into the political beliefs, associations and activities of all applicants;

(2) it compels the holding of a particular belief, namely loyalty to and belief in the Constitution and form of government of the United States, as a condition of admission to the bar;

(3) it places on the applicant the burden of proving his belief in and loyalty to the form of government of the United States;

(4) because of its vague and overbroad standards it inquires, through questionnaires and interviews, indiscriminately, arbitrarily and unreasonably into the personal lives and activities of all applicants.

Statement of the Case

Admission to practice law in the State of New York (and dependent admission to the United States District Courts in New York) is controlled by a complicated statutory-rule-questionnaire-affidavit structure. Judiciary Law §90 directs each of the four Appellate Divisions of the state's supreme court to "be satisfied" that the applicant "pos-

sesses the character and general fitness requisite for an attorney." The Civil Practice Law and Rules (statutes enacted by the Legislature) direct each division to appoint a committee on character and fitness (Rule 9401) which must certify the applicant following investigation by its own "form of statement or questionnaire" calling for "all the information and data required by the committee and the appellate division justices." Each of the four committees and groups of justices is free to require whatever information it wills over the minimum requirement as to all places and dates of residence (Rule 9404). The committees are admonished, however, by Rule 9406 that no applicant shall receive his certificate, and the appellate divisions are advised that no person shall be admitted, *"unless he shall furnish satisfactory proof* to the effect that *he believes* in the form of the government of the United States and *is loyal* to such government' and meets certain standards of citizenship and residence. (Emphasis supplied.) The state's highest court has ruled that "[e]very applicant... *must produce and file* . . evidence that he possesses the good moral character and general fitness . . . provided in Section 90 of the Judiciary law. . . . " (Rule VIII-1, Rules of the New York Court of Appeals for Admission of Attorneys and Counselors-a-Law.) (Emphasis supplied.)

Each of the four appellte divisions has made rules and adopted, and from time to time amended, questionnaires to implement the procedures and structure under attack. Some of the amendments occured just prior to and during the course of this litigation. The questions still at issue are set out at 5a-7a. In addition to the questionnaires, each department has issued instructions on the areas of per-

sonal and home life to be covered by the affidavits required by Rule VIII. The final stage of the process is a personal interview conducted by the committee and based upon lines of inquiry developed by answers to the questionnaire, supporting affidavits and the "further examination and inquiry" which the committee is authorized to make without limitation Rule 9401 and Court of Appeals Rule VIII-2).

"Character and general fitness" in Judiciary Law §90 are undefined; the range and scope for the "data and information required" by Rule 9404 are not limited; the quantum of "satisfactory proof" that "he believes" and "is loyal" which the applicant "shall furnish" under Rule 9406 is unspecified; the concept of "good moral character" on which the prospective attorney "must produce and file evidence" under Rule VIII-1 is left undefined by the Court of Appeals and is not mentioned by the Legislature.

These plaintiffs, law students and an organization of law students, commenced this action seeking injunctive and declaratory relief asserting rights on behalf of classes of law students, law students' organizations and persons seeking legal representation, alleging violations of rights of free expression, privacy, association, and belief and complaining of the threat posed by defendants' procedures to a free, vigorous, independent and sympathetic bar for persons seeking such representation.

Under penalties of perjury (N. Y. Penal Law §210.00) each applicant is required by unequivocal directions to make disclosure "fully and accurately" of any fact or information called for.

Consequently, appellants argued that, since the Character Committee, under the broad language of the enabling statutes, could reinstate deleted questions or formulate even more intrusive ones, the statutes themselves should be declared invalid. But the majority below confined its discussion only to the four following questions:

"26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

27(a). Do you believe in the principles underlying the form of government of the United States of America?

(b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?

31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is 'Yes,' state the facts.

32(a). Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?

(b) Will you conscientiously endeavor to conform your professional conduct to them?"

In its opinion of February 17, 1969, the court below remanded Questions 26, 27(a) and 31 to the Character Committee for revision in light of its opinion; upheld Question 27(b); and upheld Question 32(a) and (b) with the understanding that they would permit "dissent on a reasoned basis." A. 167.

After the opinion of the three-judge court, appellees offered to amend item 26 as follows:

"26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?"

They offered to revise Question 27(a) to read:

Do you believe in the constitutional form of government of the United States of America?

The court below in its final judgment accepted the changes in Question 26 but changed Question 27(a) to read as follows:

> "27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain."

The Committee omitted Question 31.

Plaintiffs appeal from the judgment insofar as it fails to grant the full relief originally sought by them.

Summary of Argument[2a]

This case, unlike other bar admission cases which have been before this Court, presents a view of the entire procedure by which applicants to the bar are screened. That procedure is challenged not merely because certain questions improperly delve into political beliefs and associations generally recognized to be beyond the constitutional reach of the state, but because in its entirety it demands of every applicant a soul-searching inquiry into the farthest reaches of his personal life, past and present. We submit for this Court's review not only the practices as they now exist, but, to illustrate the scope of the inquiry which the Character Committee believes statutorily authorized, as it existed at the start of this litigation.

[2a] A separate brief is being filed simultaneously on behalf of appellants in the companion case of *Wexler* v. *Supreme Court of the State of New York*. To the extent that arguments raised in that brief are not made in this brief, they are incorporated by reference herein.

The impact of the inquiry under review can be appreciated only in the context of increasing hostility by the government and its spokesmen towards political dissidents and their organizations. In this developing climate of hostility towards those who dissent, as the number of prosecutions of political activists increases, the dangers of the Character Committee's screening procedures become singularly apparent.

It can be safely assumed that the law school graduates who will be appearing before the Character Committee in the coming years will, in increasing numbers, contrast with its members in life style and political outlook. Though such matters have no relation to their fitness to practice law, they will be called upon to explain their personal activities, their politics and their morals to men they have every reason to expect to be unsympathetic. Knowing that they face inquiries into such personal matters, they may forego controversial, but constitutionally protected, activities or they may forego applying to the bar. Or they may be rejected by the committee for failing to meet its political and moral standards. In none of these cases are the interests of either the public or the bar served.

The Committee accomplishes its search of an applicant's political and personal life by means of an elaborate questionnaire, personal interviews, "home life" affidavits, and a statute which commands that he prove his loyalty to and belief in the government. The questionnaire demands an explanation of membership in any "subversive" organization, regardless of the character of the organization or the nature of the membership. Its inquiry into such a broad area of constitutionally protected association is in derogation of principles clearly established by this Court.

Another question and CPLR 9406 compel professions of loyalty and belief, in contravention of this Court's repeatedly stated principle that a person's beliefs are of absolutely no concern to the government.

Another question solicits details about an applicant's arrests, without limitation as to the crime charged or its disposition. Given the large number of arrests arising from constitutionally protected activities, this inquiry is another form of probing into political activity. Since so many of these political arrests lead to charges which are dismissed or convictions which are reversed, the state has no legitimate interest in such far-reaching disclosure.

CPLR 9406 places upon the applicant the burden of proving his loyalty. In addition to the unconstitutionality of compelling loyalty, to place this burden on the applicant clearly contravenes this Court's holding in *Speiser* v. *Randall*, 357 U.S. 513.

Other questions as well as the home life affidavits inquire indiscriminately into an applicant's personal life and past activities without any rational connection to legitimate interests of the Character Committee. These inquiries offend the emerging right of privacy enunciated in a variety of contexts by this Court. Those cases begin to give content to the notion that an individual has a right to be free from unreasonable intrusions by his government.

The statutory scheme pursuant to which the Committee has developed its inquiries remains unaffected by the decision below. The defendants have not conceded that they lack authority to ask any questions, except perhaps those specifically prohibited. To insure against other equally onerous inquiries being propounded in other times, this Court should require the entry of an injunction based on its ruling on the substantive issues presented.

ARGUMENT

POINT I

The statutes, rules, questionnaire and affidavits by which admission to the bar is regulated broadly invade an applicant's privacy and his political beliefs and activities in violation of his rights under the First, Ninth and Fourteenth Amendments.

This Court has had before it at various times particular aspects of the procedure whereby applicants for admission to the bar are screened. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232; *Konigsberg* v. *State Bar of California,* 353 U.S. 252; *Konigsberg* v. *State Bar of California,* 366 U.S. 36; *In re Anastaplo,* 366 U.S. 82; *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96. In this case, for the first time, the entire procedure is attacked as broadly invading First Amendment rights and rights of privacy. Although some of the issues raised here have been treated by the Court before,[3] the complex screening process whereby statutes, rules and questions interact to delve deeply into an applicant's private and political associations and beliefs, both past and present, has never before been considered by the Court in its entirety. Though we will proceed to analyze particular provisions of this screening process, an overall view suggests an obvious analogy to that which was said about a teacher-screening program:

> "The very intricacy of the plan and the uncertainty of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who

[3] See Point IIA, *infra.*

> would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 601.

This case presents a plan no less intricate, with proscriptions no more certain. That some of its most onerous features were discarded in response to both the filing of these suits and, subsequently, to the opinion of the court below, does not detract from the issue before this Court, namely, that the standard pursuant to which the screening of bar applicants is authorized, "character and fitness," has remained unaffected by this litigation, with no concession by the defendants that the breadth of their original inquiry was not authorized by the statute. See Point IV, *infra*.

We do not challenge the State's right carefully to scrutinize admissions to the bar in order to insure for the public the integrity and competence of its legal profession. But "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 439 (1963). Simply stated, it is required of the State that

> "an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed.... An unlimited and indiscriminate search of the employee's past which interferes with his associational freedom is unconstitutional." *Schneider* v. *Smith*, 390 U.S. 17, 24 (1968).

No such precision appears, however, in the enabling statute under which defendants have promulgated the questionnaire which applicants to the bar must complete. Both Section 90 of the Judiciary Law and Rule 9404 of the New York Civil Practice Law and Rules command an in-

vestigation into the "character and fitness" of the applicant. As to an almost identical standard, this Court has said that it is

> " . . . unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 263 (1957).

As more particularly shown in the following Section, and observed by Judge Motley in her separate opinion below, the defendants, pursuant to their vague statutory mandate, have devised a plan which graphically illustrates the fears expressed in *Konigsberg*.

The Character Committee has construed its statutory authority to support an almost unlimited invasion of personal and political privacy, relevant to the practice of law only on the theory that the more one knows about an applicant, the better one can predict the kind of lawyer he will be. Aside from the questionable assumption underlying that theory—that such information in the hands of men who are professional lawyers, but amateur psychologists and sociologists, has any predictive value[4]—it totally disregards the fundamental right of the citizen to be free from needless government intrusion. That the state may

[4] It is by no means certain that the social scientists are able to predict a great deal from even more elaborate screening programs. See, *e.g.*, Westin, *Privacy and Freedom*, 141-43 (1967).

have some greater interest in him because he is an applicant to the bar does not answer the question. If, in the exercise of its right to regulate admission to the bar, the state

> ". . . threatens significantly to impinge upon constitutionally protected freedom, it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates* v. *Little Rock*, 361 U.S. 516, 525 (1960).

The investigating scheme implemented by defendants bears no "reasonable relationship" to any legitimate purpose of the state because, as discussed in the subsequent sections of this brief, it inquires indiscriminately into the applicant's constitutionally protected activities and beliefs and because it solicits information far in excess of that which is necessary for the Character Committee to properly perform its task. That task is defined by the term "character and fitness," a standard which neither opinion below finds deficient on its face. A. 151, 192-93. The majority found it restricted to "suitability for the practice of law," while Judge Motley tried to refine it further by drawing on definitions offered by Justice Frankfurter and Professor Walter Gellhorn.[5] A. 191-192. But if that standard is susceptible of limitation, the practice of wholesale invasion of the applicant's political and personal activities and beliefs compels at least the conclusion reached by Judge Motley, that "its interpretation, implementation and application . . . are unconstitutional" A. 196-7, and sup-

[5] *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (Frankfurter, *J.*, concurring); W. Gellhorn, *Individual Freedom and Governmental Restraint*, 150 (1956).

ports plaintiffs' argument that the words are also so ambiguous as to invite the arbitrary and discriminatory use to which they have been put and are therefore unconstitutionally vague.

POINT II

The bar admission screening process infringes First Amendment freedoms by seeking information relating to political activities, beliefs and associations.

It is well to bear in mind here that appellants assert more than a personal right to privacy of beliefs and associations. They speak, as have others before them,[6] of the important need for lawyers who are committed to the law as a tool for pursuing social justice and who are committed to the representation of unpopular causes and clients. As against the State's interest in insuring the honesty, integrity and competence of members of the bar, they suggest, therefore, consideration not only of appellants' personal rights, analyzed below, but of the public's considerable interest in a bar which is truly free from political surveillance by the government.

In this regard, Judge Motley found it appropriate to note that the organizational plaintiffs in this and the companion case are comprised of law students dedicated to the protection of civil rights and civil liberties. The objectives of the Law Students Civil Rights Research Council, Inc. are "to eliminate prejudice and discrimination" and to assist members of the bar representing the "indigent, poor and distressed . . ." A. 184. The organiza-

[6] See, *e.g.*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415; *In re Anastaplo*, 366 U.S. 82, 115 (Black, *J.*, dissenting); *Sobol* v. *Perez*, 289 F. Supp. 392 (D. La. 1968); Pollitt, "Timid Lawyers and Neglected Clients," *Harper's* (August, 1964).

tions, Judge Motley pointed out, alleged that they would succeed in their goals "only if law students feel free to engage in such activities uninhibited by the fear of subsequent delay or denial of admission to practice because of affiliation with these organizations." A. 186.

That fears of retaliation for association with controversial clients are far from groundless is evident from a number of recent incidents in which lawyers have been disciplined or threatened with discipline as a result of their participation in controversial trials.[7] When in addition, the Justice Department and the Federal Bureau of Investigation publicly criticize those who participate in peace marches, announce investigations of organizations engaged in dissent and assert the right to engage in electronic surveillance of those organizations without judicial authorization,[8] then we may anticipate that many law students will forego legitimate affiliation with such organizations for fear of having to respond to the political inquiries of the Character Committee.[9]

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[7] *New York Times*, Nov. 6, 1969 (p. 54), Feb. 4, 1970 (p. 19) and Feb. 16, 1970 (p. 1). In addition, the lawyer who recently defended nine persons in Washington D. C. accused of burning draft cards was sentenced to 30 days in jail for contempt at the close of the trial. *Village Voice*, Feb. 19, 1970 (p. 9). See also, *Matter of Spencer*, No. 513, *prob. juris. noted*, 38 U.S. Law Week 3287 (Feb. 2, 1970).

[8] *New York Times*, Nov. 17, 1969 (p. 1), Nov. 19, 1969 (p. 1), June 14, 1969 (p. 1).

[9] An example of the kind of hostility to mere membership in a disapproved organization which an applicant might anticipate is found in *United States* v. *Smith*, 414 F.2d 630, 636 (5th Cir. 1969) upholding, as a condition of probation, an order that a defendant "forego any association whatever with the Students for a Democratic Society." See also, *Cole* v. *McClellan*, Nos. 23424 and 23425 (D.C. Cir.) (pending), contesting subpoenas issued by the Senate Permanent Subcommittee on Investigations against at least twelve universities seeking membership lists of campus political organizations.

These are, we submit, times when the country can ill afford to have lawyers retreat from their time-honored role of defending those who are the victims of public scorn and contempt.[10] The procedures at issue here threaten just such a retreat, both through the exclusion of those deemed to be "subversive" or "disloyal" and through the self-restraint exercised by those who must account for their political activities to the Committee. Moreover, the mere existence of such a political screening program inevitably tends to encourage greater encroachments on civil liberties. They result, as Professor Emerson has observed, in "corruption of the entire political atmosphere." Emerson, "Toward a General Theory of the First Amendment," 72 *Yale L.J.*, 877, 892 (1963).

Against the broad public impact on the right to dissent which flows from this screening program, the state asserts the untenable proposition that protection of the public demands the investigation of "subversive" and "disloyal" applicants. But in support of that proposition history offers not even the flimsiest of evidence. If prevention of

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[10] Mayor John Lindsay of New York City, on the recent occasion of ceremonies commemorating the 100th anniversary of the Association of the Bar of the City of New York, issued this call to the legal profession:

> "The frenzy, the bitterness, the tumult of the last few years have led many people—including many in positions of power—to expect peace and order to come by whittling away at the Bill of Rights of our Constitution. Today, when the turmoil has made repression a politically popular step, it is our obligation as lawyers to stand against it—in whatever form it takes." *New York Post*, Feb. 20, 1970 (p. 50).

Tom Wicker commented along the same lines some days earlier:

> "The legal establishment in America, which ought best to understand this menace, has a special responsibility for exposing the lasting consequences of momentary political hysteria." *New York Times*, Feb. 1, 1970 (Section 4, p. 12E).

politically motivated misuse of the legal process is the interest to be protected, one would expect to find in the reports of disciplinary proceedings substantial evidence that "politically suspect" lawyers had been punished for misconduct. No such evidence has been brought forward. Nor is there evidence that such lawyers have been effectively screened out.[11] What the evidence does point to is that the screening programs enormously exaggerate the dangers which they are designed to meet, they bear no relationship to any reasonable interest of the state, and, in the process of probing the innermost reaches of the mind, they affront human dignity and curtail individual freedom. When, as Judge Motley points out, "adequate remedies in the form of criminal penalties and disbarment already exist to punish and deter irresponsible conduct," A. 204, defendants' political screening program is constitutionally intolerable.

The constitutional infirmity of this program is demonstrated by particular aspects of it now to be discussed.

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[11] A study of rejections by bar committees indicates that only ½ of one percent were denied admission on *any* character grounds. Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 *U. Chi. L. Rev.*, 480, 497 (1953); 45 Ill. B.J. 818 (1957).

It is perhaps only a historical curiosity, but nevertheless suggestive of the predictive value of inquiries into beliefs and associations, that the Czar's analogue to the Character Committee gave Lenin a "Certificate of Loyalty and Good Character" and admitted him to the bar. Wolfe, *Three Who Made A Revolution* 85 (1955).

A. *The requirement that an applicant explain innocent membership in organizations advocating or teaching the violent overthrow of the government inhibits the right of free association protected by the First Amendment.*

Question 26(a) of the Questionnaire, as modified in response to the order of the court below, asks:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or groups of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below."

Prior to modification the inquiry was not limited to organizations about whose purpose the applicant had knowledge. Finding this question too broad, the court held:

> "The prospect of having to respond to a inquiry like Question 26 might have a deterring effect on exercise of the constitutionally protected right of association . . . ." A. 165.

While approving the court's limitation on the scope of the inquiry, appellants believe that Question 26(a) still deters constitutionally protected association by inquiring into membership which, even if knowing, is entirely lawful. The information sought by that inquiry has little relationship to the concededly legitimate interest of the state in securing the character and fitness of the bar.

Our position derives from principles established by several cases in the loyalty-security area. We begin with the holding in *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) that mere membership in a "subversive" organization (there the Communist Party) did not permit an inference of bad moral character so as to justify exclusion from the bar. This principle was extended, at least for the teaching profession, by a series of loyalty oath cases culminating in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967),[12] which held that knowing membership in a subversive organization, without intent to further its unlawful aims, was too broad a standard on which to condition employment. Unless different standards are to be applied to admission to the bar and to the teaching profession—and nothing in the opinion below or in the decisions of this Court suggest such a distinction[13]—then it is apparent that, at least as regards membership in "subversive" organizations, an applicant for the bar could not be excluded except upon a showing that his membership was with the intent of furthering the organization's unlawful aims. And that intent may not be defined in terms of "mere advocacy" but rather in terms of an "incitement to imminent lawless action." *Brandenburg* v. *Ohio,* 395 U.S. 444, 449.[14]

Question 26(a), however, solicits information not only about membership with unlawful intent but innocent mem-

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[12] See, *e.g., Baggett* v. *Bullitt,* 377 U.S. 360; *Elfbrandt* v. *Russell,* 384 U.S. 11. See generally, Note, "Loyalty Oaths," 77 *Yale L.J.* 739 (1968).

[13] See, *e.g., Konigsberg* v. *State Bar of California,* 366 U.S. 36; *In re Anastaplo,* 366 U.S. 82.

[14] Although we have focused on part (a) of Question 26 because it is especially illustrative of the overbreadth of the committee's political inquiry, part (b) seeks information unrelated to unlawful action and is also unconstitutional under the same reasoning.

bership as well. It is true that it only asks for the information and does not suggest that such membership alone will disqualify an applicant. Nevertheless, in the context of the applicant's burden of proving his loyalty, see Point IID, *infra,* the disclosure of such information carries a reasonable apprehension that it may obstruct his admission. This Court has concluded in two legislative investigation cases that the mere inquiry into constitutionally protected association—with no specific penalty attaching to the information it disclosed—violated First Amendment rights. In *Watkins* v. *United States,* 354 U.S. 178, 200, Chief Justice Warren warned Congress and its investigating committees that there is no "general power to expose where the predominant result can only be an invasion of the private rights of individuals."

> "Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous." *Id.* at 197.

See also, *United States* v. *Rumely,* 345 U.S. 41. Reaching the same conclusion in *Sweezy* v. *New Hampshire,* 354 U.S. 234, Justice Frankfurter, in a concurring opinion, said that

> "the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing intent of the State . . . ." *Id.* at 265.

See also, *Talley* v. *California,* 362 U.S. 60.

In requiring disclosure of constitutionally protected associations, Question 26(a) deters the exercise of First Amendment rights by those who, in expectation of having to account for membership in suspect organizations, will "tend to adhere to the most orthodox and uncontroversial views." *Watkins* v. *United States, supra,* 354 U.S. at 198. Conceding the validity of the State's interest in securing the character and fitness of bar members, in matters touching the First Amendment, such as free association, the state must choose "less drastic means" to achieve its purpose. *United States* v. *Robel,* 389 U.S. 258, 268. See also, *Aptheker* v. *Secretary of State,* 378 U.S. 500, 507-08. It was said in *Shelton* v. *Tucker,* 364 U.S. 479, 488:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved."

The principle announced by *Shelton* was subsequently stated in terms of "precision of regulation," *NAACP* v. *Button,* 371 U.S. 415, 438, but the import is the same: where government pursues a legitimate goal, it must do so by those means which least inhibit individual liberty. It should be emphasized that this does not invite a "balance" of the state's interest against appellants' First Amendment rights. Citing *Shelton,* this Court recently rejected the "balancing" argument in this context, and held that conflicts between governmental interest and individual rights must "be accommodated by legislation drawn more narrowly to avoid the conflict." *United States* v. *Robel,* 389 U.S. 258, 268, n. 20.

Konigsberg *and* Anastaplo

Two Supreme Court decisions since *Shelton* have considered the application of its principles to bar admission inquiries. *Konigsberg* v. *State Bar of California,* 366 U.S. 36; *In re Anastaplo,* 366 U.S. 82. In both of those cases, applicants were denied admission to the bar for refusal to answer questions regarding their membership in the Communist Party. In upholding the state's right to ask those questions, the Court conceded that the information sought could not by itself justify exclusion from the bar. Nevertheless, the Court held that the state, in the course of investigating whether the applicant had engaged in criminal activity, need not be restricted to asking the ultimate question but could seek information which would allow it to verify independently the applicant's answer.

While believing the invasion of protected association permitted by *Konigsberg* and *Anastaplo* not to be justified by any legitimate interest of the state—and believing that the assumptions upon which it relied have been undermined by subsequent decisions of this Court[15]—there is, in any case, an important distinction between an inquiry into Communist Party membership and the inquiry of Question 26(a) into "any organization or group of persons . . . advocating or teaching that the government . . . should be overthrown. . . ." Although an infringement of First Amendment rights flows from compulsory disclosure of Communist Party membership, the effect is at least limited to members and potential members of a single organiza-

[15] Compare *Garner* v. *Board of Public Works of Los Angeles,* 341 U.S. 716; *Beilan* v. *Board of Education,* 357 U.S. 399 and *Lerner* v. *Casey,* 357 U.S. 468, upon which the Court relied in *Konigsberg,* with *Keyishian* v. *Board of Regents,* 385 U.S. 589 (see particularly the dissenting opinion of Justice Clark at 623-25).

tion "whose advocacy," the court below declared to be "a matter of common knowledge." A. 165.

But what organizations are encompassed by Question 26(a)? Not limited by its terms to organizations actually engaged in violent overthrow, or to organizations conspiring to that end, or even to organizations concerned with action at all, the question's sweeping language would apply not only to innocent membership in organizations pursuing unlawful goals (as did the question upheld in *Konigsberg*) but to innocent membership in organizations engaged in mere advocacy. In *Konigsberg* the assumption that inquiry into Communist Party membership was relevant followed from this Court's respect for congressional findings about the nature of the Communist Party, including its asserted danger to the security of the United States. *Konigsberg* v. *State Bar of California, supra,* 366 U.S. at 52. But Question 26(a) sweeps a much broader range of associational ties, applying to an unlimited number of organizations and groups which might be engaged in mere advocacy of abstract principle. Presumably an organization teaching the principles of the Declaration of Independence would have to be disclosed. Whatever interest of the state might be served by inquiry into Communist Party membership, the interest served by Question 26(a) is far too tenuous to justify its sweeping inquiry of constitutionally protected associations. As Justice Fortas, in a concurring opinion, said of a more limited inquiry, such questions "pass the outermost bounds of reason." *Schneider* v. *Smith,* 390 U.S. 17, 27.

That is not to say that the Character Committee can never inquire into an applicant's prior associations, even when constitutionally protected. For example, if the Com-

mittee has evidence that an applicant embezzled funds from his political club, it would naturally be permissible to ask him about his membership and activities in that club. *Shelton* v. *Tucker, supra,* suggests nothing to the contrary.

> "The question to be decided here is not whether the State of Arkansas can ask *certain* of its teachers about *all* of their organizational relationships. It is not whether the State can ask *all* of its teachers about *certain* of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask *every* one of its teachers to disclose *every* single organization with which he has been associated over a five-year period." *Shelton* v. *Tucker, supra,* 364 U.S. at 487-88 (emphasis added).

In other words, when some evidence justifying such questions exists, a narrow and specific inquiry into particular activities is constitutionally permissible. But propounding such questions to *all* applicants regarding *all* organizations, in the hope that it may uncover information relevant to character and fitness, is precisely what is condemned by *Shelton.*

That principle was reaffirmed by this Court recently in *Schneider* v. *Smith,* 390 U.S. 17 where a broad inquiry into past association was invalidated. The Court recognized that

> "a saboteur on a merchant vessel may, of course, be dangerous. But no charge that appellant was a sabo-

teur was made. Indeed, no conduct of appellant was at issue before the Commandant." *Id.* at 24-25.

No less has the Constitution demanded of other governmental inquiries into and searches of First Amendment areas. In the area of legislative investigations, recognizing the harm which might follow from exposure of beliefs and associations, this Court has required that an "adequate foundation . . . be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities . . . ." *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 557. In the absence of such a foundation justifying suspicion of unlawful activity, the far-ranging inquiry of Question 26(a) is not justified by a "compelling state interest," *id.* at 546, and is, therefore, unconstitutional.

We believe this result compelled not only by an analysis of the cases in this Court but by an appreciation of the far-reaching impact on associational freedom threatened by Question 26(a). By focusing on organizational affiliations at a time when membership in certain organizations is viewed with suspicion by the public and the government,[16] the question graphically illustrates the dangers created by any political screening program. Any casual reader of the daily newspaper is aware of the proliferation of protest groups in recent years, especially around

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[16] See notes 8 and 9, *supra*. Recently retired United States Attorney Cecil Poole, from the Northern District of California, accused the Justice Department of being "out to get the Black Panthers." *New York Post*, Jan. 14, 1970 (p. 18). Assistant Attorney General Kleindienst has been quoted as saying with regard to obstructive student demonstrators that "they should be rounded up and put in detention camps." *New York Times*, April 27, 1969 (p. 64).

college campuses. Their membership is shifting, often overlapping, their goals elusive and ill-defined.[17] But they have attracted some of the best of their generation, some of the brightest, most committed, most idealistic.[18] Though some who criticize their activities concede that they have been a force for constructive social change,[19] they remain the subject of widespread public controversy. If, for fear of having to disclose their activities to the bar, some of these young men forego perfectly lawful associations, the First Amendment—and the society at large—will be the loser. If, by virtue of disclosing these associations, or failing to disclose associations which the Character Committee later believes to have goals encompassed by Question 26(a), the bar finds it has no place for these young men, then the legal profession—and the public—will be the loser.[20] If there is a "compelling state interest" related to this question, it is in its elimination.

B. *The Loyalty oaths required by CPLR 9406 and Question 27(b) are vague and overbroad and compel a declaration of belief in derogation of First Amendment rights.*

The First Department's screening program contains two separate requirements regarding the applicant's loyalty.

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[17] See, *e.g.*, Skolnick, *The Politics of Protest* Ch. 3 (1969).

[18] *Ibid.* See generally, Keniston, *Young Radicals* (1968).

[19] *New York Times*, Feb. 17, 1970 (p. 32) "School Activists Praised By a State Commission." See generally, *Crisis at Columbia: Report of the Fact-Finding Commission Appointed to Investigate the Disturbances at Columbia University in April and May* (1968).

[20] Compare this Court's analysis in *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 295:

> "it is not consonant with due process to require a person to swear to a fact that he cannot know . . . or alternatively to refrain from a wholly lawful activity."

CPLR 9406 requires, as a condition of admission, that an applicant "furnish satisfactory proof . . . that he believes in the form of the government of the United States and is loyal to such government . . ." Question 27(b) asks an applicant to affirm "without any mental reservation" that he is "loyal to and ready to support the Constitution of the United States."

Quite apart from the vague terms which characterize both oaths, their insistence that an applicant hold a particular belief—and, in the case of Question 27(b), to hold it "without any mental reservation"—mocks the Constitutional requirement that "one be permitted to believe what he will." *American Communication Association* v. *Douds*, 339 U.S. 382, 412. Of the many indignities inflicted upon citizens by the variety of oaths which have come before this Court in recent years,[21] not until the oaths presented in this case had any sought to tell a man what he might and might not believe. With whom he might associate, what he might advocate, yes; but not what he might believe. Even the two oaths which this Court has upheld in recent years, *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd per curiam*, 390 U.S. 36, and *Hosack* v. *Smiley*, 276 F. Supp. 876, *aff'd per curiam* 390 U.S. 744, required only a promise to support the Constitution. What the applicant thought about the Constitution was not probed. Although inroads into First Amendment freedoms have been justified upon a showing of a "compelling" state interest, see, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, this Court has never qualified the principle, articulated by Justice Douglas, that the

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[21] For a review of these cases, see generally, Note, "Loyalty Oaths," 77 *Yale L.J.* 739 (1968).

> "domains of conscience and belief have been set aside and protected from government intrusion . . . . What a man thinks is of no concern to government." *Speiser* v. *Randall,* 357 U.S. 513, 536 (1958) (concurring opinion).

See also, *Thomas* v. *Collins,* 323 U.S. 516, 531 (the "First Amendment gives freedom of mind the same security as freedom of conscience").

The limitation on freedom of belief imposed by these oaths is inconsistent not only with this Court's unequivocal defense of freedom to advocate[22] but with Justice Jackson's eloquent indictment of the compulsory flag salute in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624. Holding that the state had no greater power to compel affirmance of a belief than to suppress one, the Court declared that no official

> "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

That this limitation on official power would extend to an attempt to compel a declaration of loyalty seems self-evident. Nevertheless, the court below, without mentioning *Barnette,* failed to find any objection to the loyalty provisions. With regard to Question 27(b), the court could see no objection to requiring an affirmation of loyalty to the Constitution in view of the constitutional validity of re-

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[22] See, *e.g.*, *Brandenberg* v. *Ohio,* 395 U.S. 444; *Noto* v. *United States,* 367 U.S. 290; *Scales* v. *United States,* 367 U.S. 203; *Yates* v. *United States,* 354 U.S. 298.

quiring an affirmation to support it. A. 162. That interpretation suggests that the two affirmations in Question 27(b) mean the same thing, leaving unexplained why both were included. The seeming invasion of belief accomplished by the phrase "without any mental reservation" is dismissed by the court with the observation that the same phrase appears in oaths taken by the judges.[23] A. 162. We respectfully suggest that there is little difference in swearing loyalty "without any mental reservation" from pledging "undivided allegiance to the government of the United States." As to the latter phrase, this Court has spoken strongly of its implied restriction against any "lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United States." *Baggett* v. *Bullitt*, 377 U.S. 360, 371-72. That constitutional vice is magnified in this case when the applicant knows that he will not only have to swear his loyalty but also bear the burden of proving it. See Point II D, *infra*.

As for the belief and loyalty provision of CPLR 9406, the court accepted the defendants' interpretation, which was that it merely tested the applicant's good faith in taking the "constitutional oath" required by New York Constitution, Art. XIII, §1. A. 155. But if belief in a certain form of government and loyalty to that government becomes a pre-condition for taking the "constitutional oath" and, thus, for admission to the bar, then the state inquires into "what a man thinks" and prescribes "what shall be orthodox in politics." Moreover, the court below suggests that the phrase "form of government" includes "change by lawful methods." To compel belief in "change by lawful

[23] That fact would, of course, not relieve those oaths or this one of their constitutional deficiency.

methods" not only violates the teaching of those cases upholding the right to advocate violent overthrow,[24] but would preclude from conscientious oath-taking, among others, the drafters of the Declaration of Independence and the Director of a National Commission Task Force.[25]

That the First Amendment would not permit punishment of those who believed that "lawful methods" did not always produce needed change is the clear teaching of the advocacy cases. The restriction on belief imposed by CPLR 9406 could thus be justified only upon some special showing that the bar had to be immunized from the full range of beliefs which all citizens may hold. It is not enough, we suggest, to answer that the bar has an interest in having lawyers who are dedicated to orderly change. *Konigsberg* v. *State Bar,* 366 U.S. 36, 52. Its interest in having such lawyers is certainly no greater than the society's interest in fostering national unity. Recognizing the legitimacy of that interest, however, did not lead the Court to approve a compulsory flag salute as "a permissible means for its achievement." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. at 640. Rather the court held such

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[24] See cases cited at note 22, *supra.*

[25] In a Task Force Report submitted to the National Commission on the Causes and Prevention of Violence, Jerome Skolnick, Director of the Task Force, observes:

"The proposition that domestic political violence has been unnecessary to achieve political goals is ambiguous, but it is historically fallacious no matter how one interprets it. If it means that the established machinery has permitted major 'out-groups' to move nonviolently up the politico-economic ladder, it is demonstrably false. . . .

Similarly, the proposition is false if it means that the establishment is self-transforming, in that groups in power will always share that power with newcomers without the pressure of actual or potential violence." Skolnick, *The Politics of Protest* 15-16 (1969).

compulsion to be inimical to a free society. Similarly the attempt to secure our legal institutions by punishing those who do not believe in "change by lawful methods" is inimical to the values which those institutions serve.

Even if the threat from "subversive" lawyers were greater than our history shows—and Judge Motley suggested that the "danger is small," A. 204—we believe Professor Emerson's apt description of their effect demonstrates their futility:

> "The effort to suppress belief can rarely be successful. It cannot change opinions or substitute better ones. It affects chiefly those among the unorthodox who are men of principle and, by encouraging concealment and deception, destroys the whole basis of public morality." Emerson, "Toward A General Theory of the First Amendment," 72 *Yale L.J.* 877, 919 (1963).

C. The committee's requirement of blanket disclosure of an applicant's record of arrests inhibits many prospective attorneys from engaging in controversial, though constitutionally protected, political activity.

Question 23(b) requires an applicant to state whether he has ever been summoned or arrested and, if so, to give the details.

The Committee's requirement that an applicant disclose his entire arrest record is a prime example of the overbroad scope of their political inquiry.

Given the crucial importance of the presumption of innocence in our society, it is highly questionable whether the state may require the disclosure of arrests which do not result in convictions as a condition of granting a license to practice one's profession. See generally, "Report

of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia" (1967) (hereafter referred to as the Duncan Report).

Conceding, however, for the sake of this argument, the existence of some valid governmental interest justifying a requirement that certain categories of arrest records be disclosed to defendants, it certainly does not follow that appellees have the power to require disclosure of every arrest, no matter how minor the offense and no matter how unjust and ill-founded such an arrest might have been.

Certainly, where prospective applicants for admission to the bar have engaged in political activities protected by the First Amendment and have, nevertheless, been arrested, they may not be compelled to disclose such arrests to defendants, unless the arrests actually resulted in criminal convictions.[26] To require applicants to disclose such unjust arrests both makes a mockery of the presumption of innocence and serves to deter large numbers of prospective attorneys from engaging in constitutionally protected activity.

It is ironic that a bar applicant, fresh from his initiation into the traditions of our system of criminal justice, should be confronted, as a condition of his entry into the practice of those traditions, with a command that he relinquish the protection of the most cherished of those traditions—the presumption of innocence.

In the absence of an adjudication of legal guilt, no applicant should be required to justify to the state the cir-

[26] Whether *even* convictions, when arising out of peaceful protest activity, are relevant is of some doubt. See *Hallinan* v. *Committee of Bar Examiners*, 421 P.2d 76 (Cal. 1966).

cumstances of an arrest as a condition of being licensed to practice his profession. As Mr. Justice Black stated, writing for the Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 241:

> "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."

In the highly subjective realm of character and fitness evaluation, a right to be free from being forced to justify conduct which resulted in an arrest takes on particular significance when the conduct at issue was controversial political activity. Put bluntly, why should a 25 year old bar applicant who was unjustly arrested during a demonstration seeking the integration of lunch counters in Selma, Alabama, be required to justify his conduct to a member of New York's Committee on Character and Fitness, whose views on the propriety of street demonstrations and nonviolent civil disobedience are likely to be diametrically opposed to his own? Why should Rudolph Schware have been required to attempt to justify his arrest for participating in a 1934 labor dispute and his espousal of the loyalist side in the Spanish Civil War to a hostile member of New Mexico's Committee on Character and Fitness? See, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 240-243.

It is a primary purpose of the presumption of innocence to shield persons from disabilities flowing from arrests which are not followed by convictions. Such a purpose is, of course, doubly important when the basis of the arrest in question was controversial, although constitutionally protected conduct.

The result of a procedure which exposes those controversial political activities of bar applicants which have culminated in an unjust arrest to the potentially hostile scrutiny of a member of the Character Committee (who will inevitably view the conduct in question across the "generation gap") is to inhibit prospective attorneys from engaging in such political activities. If law students fear that their political beliefs and activities will come under potentially hostile review by the Committee if they engage in constitutionally protected political activity, they will simply forego such activity as the price of routine admission to the bar. And if they do not forego their right to engage in such activity—for which they may well get arrested—they face the prospect of inquiry by the Character Committee into their political conduct and possible denial of admission to the bar.

The fear of arrest for exercising constitutional rights is well grounded. One example is the historic non-violent revolution which is attacking the system of racial separatism existing in the states of the old Confederacy. It requires no special insight to recognize that the local law enforcement apparatus has functioned during the past decade in many Southern communities as a device to harass and intimidate civil rights workers. A casual survey of the decisions of the United States Court of Appeals for the Fifth Circuit reveals incident after incident of unlawful arrest in an attempt to harass and intimidate civil rights workers.[27]

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[27] See, *e.g.*, *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967); *Achtenberg* v. *State of Mississippi*, 393 F.2d 468 (5th Cir. 1968); *Kirkland* v. *Wallace, as Governor of Alabama*, 403 F.2d 413 (5th Cir. 1968); *Davis* v. *Francois*, 395 F.2d 730 (5th Cir. 1968); *Whatley* v. *City of Vidalia*, 399 F.2d 521 (5th Cir. 1968). See also, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147. *Cf.*, *Sobol* v. *Perez*, 289 F. Supp. 392 (E.D. La. 1968).

Rather than risk the disabilities which may flow from a civil rights arrest, law students will simply refrain from engaging in any conduct which might lead to arrest. As the decisions of the Fifth Circuit grimly attest, in many localities in the South, such a decision requires a law student to cede his First Amendment rights.

The widespread misuse of the arrest power by local officials hostile to the civil rights movement has caused the New York City Council to enact Section AA 41-2.0 of the Administrative Code in an attempt to shield participants in the civil rights movement from the stigma of unjust arrests. Unfortunately, the defendants have not exhibited a similar sensitivity to the very real intimidating effect which the threat of an unlawful arrest may create.

Prospective attorneys may also refrain from participating in demonstrations opposing other injustices which they perceive. Hundreds, probably thousands, of protesters have been arrested throughout the country in recent years in violation of their constitutional rights.[28] Charges against many of the demonstrators so arrested have been frequently dismissed on motion of the respective prosecutors involved.[29] However, the stigma of an arrest record remains. It is that stigma and the fear that it will pose an obstacle to bar admission which will inevitably cause

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[28] See, *e.g.*, *Day of Protest: Night of Violence*, prepared by the Southern California affiliate of the American Civil Liberties Union (1968); *Dissent and Disorder:* A Report to the Citizens of Chicago on the April 27 Peace Parade (1968); *Gregory* v. *City of Chicago*, —— U.S. ——.

[29] Out of 423 persons arrested last year in Berkeley, 421 had the charges dismissed, *Village Voice*, Feb. 19, 1970. One of the counsel herein represented over 600 persons arrested at a demonstration near a New York City induction center in December 1967. Charges against approximately 550 were dismissed on motion of the district attorney.

prospective attorneys to refrain from First Amendment activity which carries the risk of unjust arrest.

Given the damage which blanket disclosure of raw arrest records causes in our society, especially in the sensitive area protected by the First Amendment, it is not surprising that the propriety of utilizing arrest, rather than conviction, records in investigating the character of an applicant has been called into serious question. See, *e.g.*, Duncan Report; *The Maintenance and Use of Arrest Records:* Report and Proposals by the National Capitol Area Civil Liberties Union (1967); *Morrow* v. *District of Columbia,* 417 F.2d 728 (D.C. Cir. 1969); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Wheeler* v. *Goodman,* 306 F. Supp. 58 (D. N. Car. 1969); *United States* v. *Kalish,* 271 F. Supp. 968 (D. P.R. 1967). Recently, the Bar Association of the District of Columbia, pursuant to a vote of its membership held in March, 1967, has adopted a new application form for prospective applicants which inquires solely into criminal convictions, rather than requiring the disclosure of all arrests. In addition, the Federal Civil Service Commission has modified several questions on Standard Form 57, "Application for Federal Employment," to elicit information solely about criminal convictions and not merely arrests. *Civil Service Commission, Federal Personnel Manual,* letter #731-2, August 15, 1966.[30]

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[30] On that Application, the former version of Question 37 read:

"37. Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority? (You may omit: (1) Traffic violations for which you paid a fine of $30 or less; and (2) Anything that happened before your sixteenth birthday. All other incidents must be included, even though they were dismissed or you merely forfeited collateral.)"

The present version reads as follows:

"37. Have you ever been convicted of an offense against the law or forfeited collateral, or are you now under charges for

The Federal Courts have become increasingly aware of the injustice which may be caused by the mere existence of an unjust arrest record. In *Morrow* v. *District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969), the Court of Appeals ruled that the District of Columbia Court of Special Sessions possessed inherent equitable power to prohibit the dissemination of what it considered to be an unjust arrest record. Judge Wright, speaking for the Court, held:

> ". . . in view of the extensive documentation of the harm which comes from dissemination of arrest records, to employers at least, including the likelihood that employers cannot or will not distinguish between arrests resulting in convictions and arrests which do not, an order regarding the dissemination of arrest records in a case dismissed by the court is reasonably necessary to give complete effect to the court's order of dismissal." *Id.* at 741.

In situations in which the defendant was unjustly arrested, Judge Wright specifically notes that it may be necessary to impose an absolute bar upon the use or dissemination of such records. *Morrow* v. *District of Columbia*,

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any offense against the law? (You may omit: (1) Traffic violations for which you paid a fine of $30 or less; (2) Any offense committed before your twenty-first birthday which was finally adjudicated in a juvenile court or under a youth offender law.)"

The former version of Question 38 read:

"38. While in the military service were you ever arrested for an offense which resulted in a trial by deck court or by summary, special or general court-martial?"

Question 38 now reads:

"38. While in the military service were you ever convicted by general court-martial?"

417 F.2d at 742. Certainly, where the unjust arrest grew out of constitutionally protected First Amendment activity, an absolute bar on the dissemination of the arrest record should be required.

In *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967), the Fifth Circuit, faced with a series of criminal prosecutions designed to prevent Negroes from registering to vote, ordered that the prosecutions be enjoined and that any record of arrest be expunged.

In *Wheeler* v. *Goodman*, 306 F. Supp. 58 (W.D. N. Car. 1969), a three judge United States District Court declared North Carolina's vagrancy statute unconstitutional and ordered the expunging of the plaintiffs' arrest records.

In *United States* v. *Kalish*, 271 F. Supp. 968 (D. P.R. 1967) the court ordered the physical destruction of a potential bar applicant's arrest record.

In view of the increasing criticism of the indiscriminate use of arrest records in our society[31] and in view of the pall which the fear of an unjust arrest casts over a prospective attorney's First Amendment behavior, the blunderbuss approach of defendants to a prospective applicant's arrest record must be condemned.[32]

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[31] The Duncan Report estimates that the disabilities flowing from arrests not resulting in conviction fall most heavily upon residents of ghetto areas. The Report estimates that between 60-90 per cent of the adult male population of Washington, D. C.'s ghettos are virtually foreclosed from 25 to 50 per cent of the jobs available to them in relation to their skills by virtue of the existence of an arrest record. How many qualified members of minority groups are discouraged from even considering law as a career because they believe their arrest records foreclose the possibility of admission to the bar?

[32] It is, of course, an *a fortiori* principle that the defendants' requirement that any participation in the judicial process as either

D. *The requirement of CPLR 9406 that an applicant bear the burden of proving his loyalty inhibits the exercise of First Amendment rights.*

The gross invasion of First Amendment rights which flows from the demand of broad disclosure of information pertaining to political beliefs, associations and activities is compounded by the requirement of CPLR 9406 that the applicant bear the burden of proving his loyalty. The mere equirement that an applicant affirm his loyalty we believe, for the reasons stated in Point IIB, *supra,* violates the First Amendment. To require him in addition, after having compelled such wholesale political disclosure, to prove his loyalty is seriously to endanger the exercise of First Amendment rights. *Speiser* v. *Randall,* 357 U.S. 513, which Judge Motley correctly describes as "the heart of plaintiffs' case," A. 199, dealt with a requirement that a taxpayer prove that he did not advocate the overthrow of the government by force or violence in order to qualify for a tax exemption. The Court held that the imposition of this burden on the taxpayer would cause him to avoid politically controversial activities for fear of being unable to prove his loyalty.

"... the man who knows that he must bring forth proof and persuade another of the lawfulness of his

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a plaintiff or a witness be disclosed is also an overbroad inquiry serving to deter many law students from engaging in protected activity. If participation in an action brought pursuant to 42 U.S.C. 1983, or a related statute, will inevitably cause a law student's controversial political beliefs to be made known to the Character Committee, he will be loath to participate as a party. Moreover, if serving as a witness in a criminal proceeding will likewise draw attention to an applicant's political beliefs, he will be deterred from appearing.

conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526.

See also, *Haskett* v. *Washington,* 294 F. Supp. 912, 916 (D.D.C. 1968) (Wright, *J.* concurring); *Heckler* v. *Shepard,* 243 F. Supp. 841 (E.D. Idaho 1965). The rationale of *Speiser* was carried into the obscenity area in *Freedman* v. *Maryland,* 380 U.S. 501, where this Court held that the burden of going forward and of ultimately proving that a motion picture was censorable must be on the state. And in *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 this Court held that the requirement that " . . . the addressee in order to receive his mail must request in writing that it be delivered . . . amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights."

The majority in the court below distinguished *Speiser* on two grounds. A. 152. Treating the second first, they suggested that there was no "unequivocal indication" that it imposes a true burden of proof as distinguished from a burden of coming forward with evidence." *Ibid.* Appellants believe with Judge Motley, A. 198, that that interpretation defies the clear language of the statute. Moreover, *Speiser* suggests that, in any case, such a distinction might have no meaning, for even to require the applicant to come forward initially with evidence of his loyalty may be constitutionally deficient.

"... when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State *comes forward* with sufficient proof to justify its inhibition." *Speiser* v. *Randall,* 357 U.S. at 528-29 (emphasis added.)

The majority below also said that the *Speiser* rationale did not apply to oaths "required of 'a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety.'" A. 152. "Lawyers," the majority said, "fit the latter rubric." But that misinterprets the distinction *Speiser* was making. The "limited class of persons" to which the Court referred was the group *excluded* by the oath and not the one taking it. The oath cases which *Speiser* sought to distinguish involved subversive disclaimer oaths and it was the "limited class" of subversives to which they applied. There is no suggestion in *Speiser* that the oaths in those cases would have been approved if they required, as here and as in *Speiser*, proof of loyalty, even of a limited class.

Even if we accept, for the sake of argument, the majority's assumption that the obligations and responsibilities of lawyers are greater than those of the taxpayers with which *Speiser* was concerned, therefore justifying stricter requirements of loyalty, we do not agree that the broad-gauge device of placing upon applicants to the bar the burden of proving their loyalty may be constitutionally sanctioned. When, in the past, men have been imprisoned merely for public opposition to war, see Chafee, *Freedom of Speech in the United States*, quoted in Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* 55-60 (1967), can an applicant who makes public his protest against the war have any assurance that he will be able to "furnish satisfactory proof" of his loyalty? Rather it is likely that he will forego his protest and "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dom-*

browski v. *Pfister,* 380 U.S. 479, 486. Given the availability of "less drastic means" to regulate lawyers' conduct, the requirement that an applicant prove his loyalty cannot stand.

POINT III

The unreasonably broad search of an applicant's private life undertaken by the questionnaire and affidavits serves no substantial interest of the state and thus offends his right to privacy protected by the First, Fourth, Ninth and Fourteenth Amendments.

Apart from the infringement of traditional liberties flowing from the defendants' inquiries, the indiscriminate probing by the questionnaire and affidavits of the applicant's personal life, past and present, leaves little left of the notion that some areas of a person's being are kept free from government intrusion. Though this Court has not previously faced the precise question of how far the state may inquire into an applicant's personal affairs, related cases suggest the emergence of the principle we seek to establish here.

All three judges below recognized that there exist some limitations on government probing apart from the specific provisions of the Bill of Rights. The majority, in striking down Question 31, which requested information concerning any incident "which has any favorable or detrimental bearing on your character or fitness," held:

> "We find no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life demanded by Question 31." A. 166.

Judge Motley, considering the home life affidavits,[33] said:

> "There also has been an improper invasion of the right of privacy. The hallmark of civilization is that when a man closes the door to his home and retreats to the privacy thereof the eyes and ears of the state remain outside. Griswold v. Connecticut, [381 U.S. 479]. The state simply cannot ask every affiant who supports an applicant for admission to the bar with whom the applicant lives or what the inside of his parents' home is like. There must be some specific information relating to those qualities expected of one about to enter the legal profession before these questions can be asked of a particular applicant. Gibson v. Florida Legislative Investigation Committee, [372 U.S. 539]." A. 196.

Thus in the court below, though there are differences regarding specifics, there is agreement on the principle that, at some point, the government is inquiring too far, that it cannot require so much "soul searching" as to invade the "right to privacy." It is clear, however, that the Character Committee observes no such principle as it wanders through an applicant's past, extracting the most trivial details, blithely unconcerned about the relevance of what is sought.[34]

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[33] Although the affidavit in use in the Second Department is not directly involved in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, it is challenged in the companion case, and is used here to illustrate defendants' broad interpretation of their statutory mandate. The First and Second Department affidavits are described in Judge Motley's opinion (A. 172-176).

[34] Two representative examples: Question 22 asks the facts concerning any "charges or complaints, formal or informal" made against the applicant while a member of the armed forces. Not limited by its terms to those complaints which were either substantial or substantiated, it seeks, presumably, the details of a sergeant's complaint about an improperly made bed. Questions

Our concern, however, is not simply with the uncontrolled accumulation of trivia. Rather we are particularly concerned that the Committee, in investigating an applicant's character, asserts the authority to probe an applicant's home life, and thus to scrutinize his life style and private morality.

The present home life affidavits, though broad and intrusive, do not reveal the true breadth of the Committee's claimed authority. At the start of this litigation, both the First and Second Departments required third-party affidavits that called for a characterization of the applicant's family and home environment, on the basis of which detailed conclusions about his and his family's "moral character" were to be given. Although many of the specific inquiries have been removed as a result of this litigation (A. 174-176), details regarding the applicant's "moral character"—a term which is nowhere defined—are still sought.

The proposition upon which all three judges agreed below, that there must be some compelling state interest shown before a person can be made to produce information about himself, was articulated by Chief Justice Warren as a requirement that

> "the courts strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free of unnecessary govern-

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24(d) and (e) inquire about any "claim or demand," not the subject of an action or legal proceeding, made either by or against the applicant. Thus, a playmate's request for the return of his bat and ball would be among the accumulated information by which the committee would judge an applicant's fitness to practice law. In that regard, it is important to bear in mind the warning in the instruction on the application that failure to disclose any information called for by any question may result in denial of admission.

mental interference." *Watkins* v. *United States,* 354 U.S. 178, 205-06.

In recent years, the concern expressed in *Watkins* has begun to emerge as a right of privacy. Whether that right is implied by the Ninth Amendment, the penumbras of specific guarantees of the Bill of Rights, or the guarantees of due process (see the various opinions in *Griswold* v. *Connecticut,* 381 U.S. 479) this Court has now made it clear, in many different contexts, that it will not abide unreasonable intrusions by the government into an individual's home or private affairs. See *Stanley* v. *Georgia,* 394 U.S. 557 and cases cited in *Katz* v. *United States,* 389 U.S. 347, 350 at n. 5. It is of no relevance that the state in this case secures its information under the threat of denying admission to the bar rather than by eavesdropping on his private conversations. In each case, the information is given involuntarily. The interest which needs to be protected in each case is "the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ." *Tehan* v. *Shott,* 382 U.S. 406, 414. That interest was described elsewhere as "the sanctity of a man's home and the privacies of life." *Boyd* v. *United States,* 116 U.S. 746. It is an interest that is fundamental to a free society, emerging "from the totality of the constitutional scheme under which we live." *Poe* v. *Ullmann,* 367 U.S. 497, 521 (Douglas, *J.,* dissenting). Its importance to the individual's enjoyment of freedom has been eloquently described by one commentator as follows:

"Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if neces-

sary in defiance of all the pressures of modern society. . . . The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself. . . ." Rossiter, "The Pattern of Liberty" in Konvitz and Rossiter (eds.), *Aspects of Liberty,* 15-17 (1958).

We suggest here, as we have with regard to the political inquiries, see Point II, *supra,* that the vice of the Committee's wholly undefined, and therefore limitless, investigation into an applicant's "moral character" can only be appreciated in the context of the times. Only by understanding the hostility which the changing morals and life styles of our youth have elicited from those in authority[35] can we appreciate the abuses threatened by the Committee's inquiry into the privacies of an applicant's life.

In these days of sophisticated snooping devices, psychological testing, computerized information and proposed national data banks,[36] the values subsumed by Justice Brandeis under "the right to be let alone," *Olmstead* v. *United States,* 277 U.S. 438, 478, are particularly in jeopardy. We believe that concerns which have led this Court on other occasions to bar unlawful intrusions into a person's private life are present in this case.

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[35] See, *e.g., New York Times,* Feb. 25, 1970 (p. 26) relating the Cook County Sheriff's glee in displaying pictures of the convicted defendants in the "Chicago conspiracy trial" after having been given haircuts.

At least this one aspect of life style, long hair, has been accorded constitutional protection. *Richards* v. *Thurston,* 304 F. Supp. 449 (D. Mass. 1969).

[36] See generally, Westin, *Privacy and Freedom* (1967).

POINT IV

An injunction should issue against the vague and overbroad statute pursuant to which the Character Committee has exercised its unconstitutional authority.

The changes in the Character Committee's practices which have resulted from this litigation have left unaffected the statutory standard from which the Committee derives its authority. As Judge Motley indicated:

> "'The substance of the statutory and regulatory complex remains and from the outset . . . [plaintiffs'] basic claim has been that they are aggrieved by its application.' *Keyishian* v. *Board of Regents of University of State of New York*, 385 U.S. 589 . . . ." A. 178.

See also, *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). The modification of some of the questions complained of has not diminished appellants' basic constitutional claim that the standard of "character and fitness," without further statutory definition, continues to permit the far-reaching practices in which the defendants have engaged. An injunction against these unconstitutional statutes and their application should therefore issue.

CONCLUSION

The judgment appealed from should be reversed to the extent it fails to grant all relief requested.

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APPENDIX

APPENDIX

Statutes Involved

NEW YORK CIVIL PRACTICE LAW AND RULES

Article 94—Admission to Practice

RULE 9401. Committee

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

RULE 9404. Certificate of character and fitness

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including

specifically his present and such past places of actual residence as may be required by the committee and the appellate division, listing the street and number, if any, and the period of time he resided at each place.

RULE 9406. Proof

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

JUDICIARY LAW §90(1)(a)

§90. Admission to and removal from practice by appellate division; character committees.

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that

the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

NEW YORK JUDICIARY LAW

Appendix:

Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

Rule VIII. Proof of Moral Character.

VIII-1. General Regulation.

Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2. Supporting Affidavits.

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

VIII-3. Certificate of Board of Law Examiners.

Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

VIII-4. Discretion of Appellate Division.

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

Excerpts From Application for Admission to the Bar, First Judicial Department

20. Have you ever been rejected for service in any of the armed forces of the United States or of any other country? If your answer is "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photocopy of any documentary proof thereof.

22. As a member of any armed forces have you been the subject of any charges or complaints, formal or informal, or have any proceedings been instituted against you, or have you been a defendant in any court martial proceeding? If answer is "Yes," state the facts.

23. State whether you ever have

    (a) testified or been called as a witness in any action, proceeding or investigation to which you were not a party? .....

    (b) been ticketed, or summoned, or arrested, or taken into custody, or indicted, or convicted, or tried for, or charged with, or pleaded guilty to, the violation of any law, ordinance, traffic or parking regulation or the commission of any felony or misdemeanor, or been requested to appear before any prosecuting or investigative agency in any matter? .....

    (Indicate all such incidents, including proceedings as a juvenile or youthful offender, no matter how minor the infraction or whether guilty or not. Although a conviction may have been expunged

from the records by order of court, it nevertheless should be disclosed in the answer to this question.)

(f) been a party to or otherwise involved in any action, proceeding or investigation (civil or criminal) not covered by answers to the foregoing subdivisions hereof? .....

If your answer is "Yes" to any subdivision of this question indicate the subdivision and state the facts in detail below and give in each case name and locality of court or agency, dates of beginning and termination of action or proceeding, and the judgment or other disposition.

24. (d) Has any one ever asserted as a matter of right a claim or demand against you which has not been made the subject of any action or legal proceeding? ..... If so, state the facts and the present status of the matter.

(e) Have you ever asserted as a matter of right any claim or demand against any person, partnership or corporation, or governmental agency which has not been made the subject of any action or legal proceeding? ..... If so, state the facts and the present status of the matter.

26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any political subdivision thereof should be overthrown or overturned by force, violence or

any unlawful means? If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?

27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?

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FEB 26 1970

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1969

No. ~~69C~~ 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, *et al.*,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS WEXLER, ET AL.

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Supreme Court of the United States

October Term, 1969

No. 696

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, *et al.*,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,
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v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS WEXLER, ET AL.

Opinions Below

The opinion of District Judge Motley convening the three-judge statutory court is reported at 291 F. Supp. 772 and is reprinted in the appendix at A. 106.[1] The majority opinion of the three-judge statutory court is reported at 299

[1] The designation "A" refers to the Single Appendix.

F. Supp. 117 and is reprinted at A. 143, and the partially concurring and partially dissenting opinion of Judge Motley is reported at 299 F. Supp. 133 and is reprinted at A. 169.

Jurisdiction

The judgment of the three-judge district court below was made and entered on June 16, 1969 (A. 225). Notice of appeal from this judgment was filed with the Clerk of the Southern District of New York on August 8, 1969 (A. 229). The Jurisdictional Statement was filed on October 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Statutes Involved

The constitutional validity of § 90(1)(a) of the New York Judiciary Law (hereinafter "Jud. L."), Art. 94, Rules 9401, 9404, 9406(1) of the New York Civil Practice Law and Rules (hereinafter "CPLR") and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-law contained in Jud. L. Appendix (hereinafter "Rule VIII") are here involved. The texts of these statutory provisions and of Rule VIII are fully set forth, *infra*, at 1a-4a.[2]

Questions Presented

Are applicants and prospective applicants to the New York Bar denied the freedom and privacy of their political and personal speech, beliefs, associations and activities, and is a class of their prospective clients, *i.e.*, litigants who

[2] Where general reference is made to these statutes and judicial rules, it will be by the term "statutes."

seek to redress deprivation of federal rights, denied adequate and effective assistance of counsel and free access to federal and state courts by Jud. L. § 90(1)(a), CPLR 9401, 9404 and 9406(1) and Rule VIII

(1) because they unreasonably predicate admission on an applicant's political background;

(2) because they establish a political screening program as a method of achieving New York's purpose despite the existence of alternative methods having a "less drastic" impact on First Amendment freedoms;

(3) because, on their face, they establish an impermissibly vague and overbroad political test for admission to the Bar;

(4) because they impose on every applicant for admission the burden of proving that (a) he believes in the form of government of the United States and (b) is loyal to such government;

(5) because, under threat of perjury prosecution or delay in or disqualification from admission, they compel every applicant to submit to unlimited and indiscriminate personal and political interrogation without an adequate foundation or probable cause first having been established on the record; and

(6) because, as applied through questionnaires, oral interrogation and other practices, they authorize an unconstitutionally broad, vague and indiscriminate inquiry into the personal and political life of each applicant.

Statement of the Case

This brief is submitted on behalf of appellants Stephen Martin Wexler and Robert M. Cover, who have passed their bar examinations and are presently applicants to the

New York Bar,[3] The Columbia Law Students Guild, an organization composed largely of law students and recent graduates of Columbia University Law School, and the New York City Chapter of the National Lawyers Guild, a bar association in New York City.[4]

Appellants are challenging the constitutional validity of the above-mentioned statutes which require applicants to undergo personal and political screening by the appellees as a prerequisite for admission to the New York Bar.

The New York admission scheme operates as follows. Under Jud. L. § 90(1)(a), the appellee courts (hereinafter "Appellate Divisions") have the sole power to grant applications made in their respective jurisdictions for state-wide admission to the New York Bar.[5] Before granting admission, the Appellate Divisions must be satisfied that the applicant has proven that he "possesses the good moral character and general fitness requisite for an attorney and counselor-at-law" [Jud. L. § 90(1)(a); Rule VIII] and that he "*believes in the form of government* of the United States and is *loyal* to such government" [CPLR 9406(1)]. (Italics supplied.)

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[3] Appellant Kaimowitz became a member of the New York Bar during the course of this litigation, see *infra*, p. 45, n. 49.

[4] A separate brief is being filed on behalf of the appellants in *Law Students Civil Rights Research Council, et al.* v. *Wadmond, et al.*, and to the extent that their legal arguments supplement ours, we incorporate them herein by reference.

[5] The State of New York is divided into four judicial departments, with an Appellate Division for each. N.Y. Const. Art. 6, § 4; Jud. L. § 70. Admission in the department of residence is, as the court below noted, "the key to lawful practice throughout the State" (A. 158), since it licenses practice before the New York Supreme Court sitting in any department and before the New York Court of Appeals.

In 1968, 1,522 applicants were admitted in the First and Second Judicial Departments comprising approximately 70% of the total admissions for that year throughout the State.

To enable the Appellate Divisions to carry out their responsibility, CPLR 9401 and 9404 authorize the appointment of the appellee Committees on Character and Fitness (hereinafter "Committees"). Under the New York scheme, these Committees are delegated not only broad investigatory powers, but are also delegated the key adjudicatory role in determining the qualifications of applicants for admission. See Rule VIII; CPLR 9401, 9404 and 9406.[6]

Thus, the Committees are charged, independently of the Appellate Divisions, with the duty of determining the applicants' political and other qualifications for receiving a certificate of admission. CPLR 9404 provides that "unless otherwise ordered by the Appellate Division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that in such respects, he is entitled to admission." Furthermore, the Committees, like the Appellate Divisions, are also directed by CPLR 9406(1) to withhold favorable action unless the applicant has furnished satisfactory proof that he believes in the form of and is loyal to the government of the United States.

The Committees' investigatory process, insofar as the present challenge is concerned, involves three principal methods of inquiry: (1) questionnaires, (2) personal interviews and (3) third-party "home life" affidavits.[7] The

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[6] See also *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 104, discussing Rule 1(d) of the New York Rules of Civil Practice, presently embodied in CPLR 9404, where the Court concluded that "the role of the Committee is more than that of a mere investigator."

[7] During the course of the litigation in the court below, the appellees narrowed somewhat the scope of the questionnaires and affidavits. However, at no time did appellees disclaim or deny either the validity or existence of the authority to re-expand the scope of inquiry. Nor did appellees give the court below any affirmative

information gathered from the questionnaire, from affidavits and the oral interview constitutes the basic evidence by which an applicant proves his qualifications for admission.

1. CPLR 9404 authorizes the Committees, subject to the approval of the justices of the Appellate Division, "to prescribe and from time to time amend a form of statement or questionnaire on which applicants shall set forth all the information and data required by the Committee." [8]

The questionnaires in both the First and Second Departments have customarily included broad inquiries into the applicant's personal and political associations, beliefs and activities (A. 53-76, 160-162, 177-183). See *infra*, n. 39, regarding the political inquiries on the Third and Fourth Department questionnaires.

Just prior to the commencement of these suits on July 16 and 17, 1968, the Appellate Divisions prepared a revised questionnaire which narrowed or eliminated some of the challenged interrogatories. Although the First Depart-

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assurance that such an expansion would not occur. For this reason and because the appellants had already suffered irreparable injury as a consequence of the practices by the time they had been discontinued, we believe it is appropriate to present these challenged interrogatories and other practices which were in effect in the First and/or the Second Department at the time the complaints were filed to demonstrate the scope of appellees' investigatory authorization.

Judge Motley presents a detailed description of the revisions that have been made in the challenged interrogatories and practices during the course of litigation. See A. 172-183.

[8] Complete disclosure is required. Sanctions for failure "fully and accurately to disclose any fact or information called for by any question" are indicated by express warnings on the questionnaire that all answers are given under oath (and are thereby subject to the perjury provisions of N.Y. Penal Law § 210.00) and that such failure may result in denial or revocation of admission. See A. 166, 177, 202, and also *Application of Portnow*, 253 App. Div. 395, 2 N.Y.S. 2d 553 (2d Dept. 1938).

ment had apparently distributed the revised questionnaires before these suits were instituted, the Secretary of the Second Department's Committee stated in an affidavit dated November 12, 1968 that the revised questionnaires were only "now being distributed to applicants." See A. 123. Despite the Second Department's delay and the fact that three other challenged interrogatories were not deleted from the revised questionnaires by either Department until November 7, 1968 (A. 161, n. 6), the majority below decided the validity only of those interrogatories which remained in effect at the time of oral argument on November 13, 1968 (A. 161-167). Those interrogatories read as follows:

> 26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> 27(a). Do you believe in the principles underlying the form of government of the United States of America?
>
> (b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?
>
> 31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is "Yes", state the facts.
>
> 32(a). Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?

(b) Will you conscientiously endeavor to conform your professional conduct to them?

2. Applicants are also required to obtain and submit to the Committees third-party affidavits relating personal observations of the applicant's "home life." See Jud. L. § 90(1)(a) and Rule VIII. Although the forms for these affidavits were revised after commencement of the present action, they still require the affiant to make a comprehensive evaluation of an applicant's home life. The present forms in the First Department require the affiant to state:

"6. Length and nature of affiant's acquaintance with applicant:

(a) Residence of applicant;

(b) Persons with whom applicant lives (if known to affiant).

7. Affiant's conclusions as to applicant's moral character.

8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based."

The Second Department form requires the following:

"5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the particular activities should be specified.

* * *

7. What is your conclusion as to applicants' moral character? (Reserve details for next question.)

8. State in detail the facts upon which your knowledge or opinion as to applicant's moral character is based.

9. Have you visited applicants'

(a) parental home;

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(b) marital home, if any;

(c) any other home or place of abode applican may have had?

10. How often have you visited the parental, marital or other home or place of abode of applicant? ('Frequently' or 'often' or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)"[9]

3. After submitting the questionnaire and third-party affidavits, each applicant is scheduled for a personal interview with a member of the Committee having jurisdiction over his application. The purpose of this interview is to explore areas of inquiry disclosed by the questionnaires, affidavits or other information independently obtained by the Committee.[10] In particular the "applicant may be questioned about his affiliations with any group which might be considered subversive. He must reveal fully his views and past associations." Weinstein, Korn, Miller, *New York Civil Practice*, Par. 9406.03 (1968). See also *infra*, pp. 45, 50-53.

Appellants instituted this action on July 17, 1968, for declaratory and injunctive relief, charging that the political and personal screening process for admission to the New York Bar violated the rights of applicants and law students to the privacy of their associations, beliefs, speech and activities and to the exercise of these First Amendment guarantees free from penalizing or inhibiting regulation. Appellants also charged that the admission process has the further impermissible effect of culling out prospective

[9] Pertinent portions of the original affidavit forms are set forth in Judge Motley's opinion (A. 172-174).

[10] The Committees have a wide variety of sources of information including the applicant's university and law school records, police files (applicants in the Second Department are fingerprinted) and reports by attorneys or other persons made in response to notices placed by the Committee in the New York Law Journal.

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attorneys with "controversial", "radical" or "unorthodox" political and social views with the result that the class of unpopular, segregated and poor litigants is deprived of effective and sympathetic assistance of counsel and free access to federal and state courts.

The court below rendered its decision on February 17, 1969 with Judge Motley concurring in part and dissenting in part. Final judgment was entered on June 16, 1969, partially granting the appellees' motion to dismiss the complaints and partially denying appellants' motion for summary judgment and injunctive and declaratory relief.

The majority ruled that Jud. L. § 90(1)(a), CPLR 9401, 9404 and 9406(1) and Rule VIII were constitutional on their face. Appellants' challenge to these provisions as applied was also rejected by the majority except as to Questions 26, 27(a) and 31 (A. 162-168).

The court held that question 26 (*supra*, p. 7) deterred appellants' exercise of First Amendment rights because it was not limited to membership which coincided with organizational teaching or advocacy and "to cases where the applicant knew of the teaching or advocacy" (A. 165).[11]

In compliance with the court's order, appellees offered to change Question 26 to read as follows:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof

[11] Final judgment was deferred for 90 days by the court to permit the appellees to evaluate their practices and to report back to the court on the steps they would take to conform their practices with constitutional requirements (A. 169). The court below made no mention in its judgment of whether it accepted or rejected appellees' revision of Question 26.

should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State or any political subdivision thereof by force, violence or any unlawful means?"

Question 27(a) (*supra*, p. 7) was found impermissibly vague. See A. 162-163. In the judgment (A. 228), the Court ordered the question to be reworded as follows:

"27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the Constitutions of the United States and of the State of New York? If there is, please explain." [12]

As for Question 31 (*supra*, p. 7) the court held that it constituted a "catch-all" which had a "serious *in terrorem* effect" (A. 116). The court found "no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life." *Ibid.*

Summary of Argument

A. The challenged statutory scheme creates a program for screening the political fitness of applicants to the New York Bar. This, in essence, is a system of political censorship similar to those which were recently curtailed by this Court in cases involving public employees and licensees. Political controls of admission to the Bar jeopardize rights and interests beyond those of the personal liberties and

[12] The court rejected appellees' proposed rewording (A. 217): "Do you believe in the constitutional form of government of the United States?"

privacy of applicants. They affect the independence of the Bar and the rights of dissident minority groups to sympathetic counsel of their own choice.

B. An applicant's political background is not relevant to the consideration of his moral character for admission to the Bar. Political activities, even where they involve unlawful speech or association, bear no rational relation to one's ability to fulfill his professional responsibilities. Nor is it possible for character committees, given their composition, to judge the morality of an applicant's political beliefs, speech or conduct.

C. New York's statutory scheme also violates this Court's rule requiring precision of regulation in the area touching First Amendment rights. That scheme will discourage the political activities of many law students and will adversely affect the admission of others to the Bar and the availability of counsel to minority groups.

1. This devastating effect on personal and public interests requires that New York rely upon a less restrictive alternative method of regulation than its present political screening program. Such an alternative is also required because New York's present scheme is a form of prior restraint. Therefore, New York should be limited to a measure less drastic in its effect upon First Amendment rights, namely, criminal or disciplinary sanctions for proven misconduct.

2. The substantive tests for admission, "good moral character and general fitness" and "[belief] in the form of government of the United States and [loyalty] to such government" are unconstitutionally vague and overbroad.

a. The standard of good moral character is satisfactory if it is based upon the traditional elements of integrity and trustworthiness. It is constitutionally deficient where it is based upon considerations of political fitness.

b. The standard of belief in and loyalty to the form of government of the United States is too vague under the recent decisions of this Court in the field of employment and licensing. This vagueness is not cured by a narrowing, *but unspecified* "interpretation", derived from appellees' revised questionnaire. The questionnaires do not purport to define this standard; rather, they initiate a sweeping inquiry of the applicant's political life.

This standard is also unconstitutionally overbroad because it is predicated upon mere *beliefs* and because it penalizes belief and advocacy which are protected by the First Amendment.

3. CPLR 9406(1) unconstitutionally imposes a burden of proving loyalty on applicants in violation of this Court's decision in *Speiser* v. *Randall*, 357 U.S. 513. This has an inhibiting effect upon the exercise of First Amendment rights.

The burden of proof cannot be justified on the ground that it operates upon prospective members of the Bar. Members of the Bar are not public employees whose duties justify governmental regulation of their political activities. Lawyers pose no danger to the state in the exercise of their professional functions. Hence, New York may not employ this procedure with its "drastic" impact on the exercise of First Amendment rights.

4. The investigatorial apparatus also lacks the sensitive procedural tools required to obviate the dangers of political inquiry.

a. It permits the appellees to discriminatorily intensify their political examination and delay admission of an applicant who has engaged in unorthodox political activities.

b. It authorizes an inquiry into protected speech, association and beliefs without a factual basis for such a search. This point was not decided by this Court in earlier Bar

admission cases which involved both narrower questions and some foundation for inquiry. In the analogous cases involving legislative investigations, the First Amendment has been held to require probable cause or a foundation for inquiry. Such a rule is even more appropriate here where the appellees possess an adjudicatory, as well as an investigatory power. Such proof of probable cause has been required in other situations involving far more compelling and immediate state interests.

c. It authorizes a sweeping and indiscriminate inquiry into the applicant's political and personal life. Moreover, the particular questions approved by the court below [Question 26 and Question 27(a) and (b)] are vague and overbroad. Question 26 also improperly requires an applicant who answers subsection (a) in the affirmative to disprove the appellees' unsupported assumption as to the organization's unlawful purposes.

d. The infringement of applicants' First Amendment rights by New York's screening program is the inevitable consequence of its having undertaken to enforce a political test. Such a task is a subjective one; it is governed by contemporary community standards, and it bears no relationship to the traditional concern of the Bar for applicants of good moral character.

e. The majority below erred in confining its review of the breadth and vagueness of the statutory scheme to the questionnaires and other practices in effect at the time this case was argued below and in disregarding practices in effect for at least two decades. These long-standing practices which demonstrate a pervasive application of these statutes in violation of constitutional limitations require a ruling that this statutory scheme is invalid on its face.

ARGUMENT

NEW YORK'S PERSONAL AND POLITICAL SCREENING PROGRAM FOR APPLICANTS TO THE BAR VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

A. Introduction

The power asserted by New York to screen the "political fitness" of applicants to the bar is in essence one of political censorship. As such, it falls into the category of state regulation most suspect and abhorred under our constitutional system. Cf. *Carroll* v. *Princess Anne*, 393 U.S. 175, 181; *Freedman* v. *Maryland*, 380 U.S. 51, 57.

Political censorship, previously accepted as the price one paid for a teaching license or other public employment and benefits, has in recent years been sharply curtailed by this Court. The premise of earlier cases that governmental employment, licenses or benefits could be conditioned upon surrender of First Amendment rights has been explicitly rejected.[13] Ironically, a Judge Motley points out, the Bar that won the political freedom for others, still remains subject, as the New York scheme illustrates, to this discarded premise and to a blatantly unconstitutional form of political control (A. 197).

Like the *Baird* and *Stolar* cases,[14] the present case involves vague and overbroad political tests, unconstitutional

[13] This was done in a series of recent employment and licensing cases in which the Court struck down vague and overbroad political regulations which penalized or inhibited the exercise of First Amendment rights. See *Pickering* v. *Board of Education*, 391 U.S. 563, 568; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606; *Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Robel*, 389 U.S. 258; *Aptheker* v. *Secretary of State*, 378 U.S. 500.

[14] *Baird* v. *State Bar of Arizona*, No. 53 (O.T. 1969); *In the Matter of the Application of Stolar*, No. 75 (O.T. 1969).

burdens of proof as to loyalty and sweeping and indiscriminate political inquiries which violate this Court's rulings in, among others, *Brandenburg* v. *Ohio*, 395 U.S. 444; *Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Speiser* v. *Randall*, 357 U.S. 513. These obvious constitutional deficiencies could have been viewed as sufficient grounds for deciding the *Baird* and *Stolar* cases. But in noting jurisdiction in this case and in ordering the reargument of *Baird* and *Stolar*, the Court has before it a representative sampling of the political censorship imposed on admission to the bar in every state and in some federal jurisdictions.[15] This provides the Court with an appropriate basis not only for reviewing the constitutional propriety of certain political tests and of the investigatorial apparatus by which these tests are implemented, but the Court may now also undertake the comprehensive reevaluation we have urged in our *Stolar* brief and oral argument regarding the validity of any political qualifications and political screening programs in the sensitive area of bar admissions.

In reurging this broader review, we are not unmindful of the decision in the second *Konigsberg* case which was echoed in the majority's opinion below. Upholding the validity of questioning applicants with respect to mem-

[15] See generally Brown v. Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953); Countryman & Finman, *The Lawyer and Modern Society*, 758, 822-884 (1966); Ginger & Koenigsberg, *Report on Rules for Admission to the Bar; Tests of Applicants' "Loyalty" and "Good Moral Character"*, 18 Law. Guild Rev. 58 (1958); 1 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, 262-283 (L.Ed. 1967); Rosenberg, *Constitutional Limitations on the Process of Admission to the Bar*, 23 N.Y.U. Intra. L. Rev. 135 (1968); Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 Tex. L. Rev. 267, 270-271 (1970).

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ership in the Communist Party, this Court in the second *Konigsberg* case found that

> "[w]ith respect to this question of Communist party membership, we regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented." 366 U.S. 36, 52.

The majority below took this to mean that New York may test a bar applicant's "*belief* at the time of admission" in "the essentials, democratic government and change by lawful methods" (A. 154-155, 162) (Emphasis supplied).

We believe that the majority below misread the meaning of that quoted portion of the *Konigsberg* opinion in that devotion to procedures for orderly change requires only that a lawyer *conduct* his practice in an ethical and legal way, not that he forfeit his First Amendment freedom to *believe* what he will. See A. 197, and *infra*, p. 38. The reading we have suggested is compatible with, and indeed required by, the Court's decisions since *Konigsberg*. See *supra*, p. 15 and n. 13.

The view of the majority below also strikes at the heart of the right of minority and dissident groups and their members to counsel of their own choice who is sympathetic or associated with their cause. Events of the last decade have revealed a new perspective on the role of lawyers and law students in representing those struggling against social injustices and inequities. Almost in belated response to Chief Justice Stone's condemnation of a large segment of the bar as the "obsequious servant of business . . . tainted with the morals and manners of the market place in its most anti-social manifestations" and his call for lawyers devoted to bearing their social responsibilities,[16]

[16] Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 7, 13-14 (1934).

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a growing number of lawyers, particularly recent law school graduates,[17] and law students, acting independently and through the appellant organizations,[18] have allied themselves with the poor and the racially and politically oppressed.

The nature of this alliance is both political and professional; their legal assistance has been offered out of a sense of moral support for the activities and goals of the minority and dissident groups, even where these activities entail civil disobedience and the goals embrace revolutionary ideologies. This alliance has become indispensable to the protection of the rights of minority and dissident groups both because the bar generally has failed to meet

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[17] See *NAACP* v. *Button*, 371 U.S. 415, 430-438, 443-445; Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone"*, 43 N.C.L. Rev. 8 (1964); Nader, *Law Schools and Law Firms*, 162 N.Y.L.J. p. 1 (Nov. 25, 1969); "New Lawyers Bypass Wall Street", *N. Y. Times* p. 37, col. 3 (Nov. 19, 1969); "New Breed of Lawyers Serving Poor", *N. Y. Times*, p. 11, col. 2 (Aug. 30, 1969); Note, *Law Students: Unconstitutional Bar Admission Procedures*, 18 Catholic U.L. Rev. 534, 537 (1969); Glickstein, *U.S. Civil Rights Commission and the Fight Against Racism*, 27 Guild Pract. 184 (1968); *The Movement and the Lawyer*, 28 Guild Pract. 1 (1969); "Activist Lawyer With a Cause," *N. Y. Times*, p. 29, col. 5 (Feb. 17, 1970); *N. Y. Times*, p. 1, col. 3 (Sept. 30, 1969).

[18] See Pollitt, *supra* at 9, 30; Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 Harv. L. Rev. 381, 341, 343 (1967); see also A. 51.

The role played by law students in civil rights, civil liberties and poverty litigation, as research assistants or as counsel under special programs allowing third-year law students to represent indigents in civil and criminal actions (see Jud. L. § 478) should be emphasized in calculating the impact of New York's screening program on the availability of legal assistance in these areas. Because of a shortage of lawyers, adequate assistance of counsel for poor persons, prisoners or the racially or politically oppressed, has come to depend directly on the services of law students. See generally *Johnson* v. *Avery*, 393 U.S. 483, 489 and n. 9 and 491 (Mr. Justice Douglas concurring); *Hackin* v. *Arizona*, 389 U.S. 143, 146 (Mr. Justice Douglas dissenting); Roberts, *Social Crises and the Lawyer and Law*

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its obligations to these groups [19] and because these groups, themselves, have sought lawyers who will serve their cause with undivided attention and loyalty.[20]

Political screening of bar applicants therefore jeopardizes more than the personal liberties of law students and applicants; it threatens an interest of overriding importance to our society—the independence of the bar—and the fundamental right of the poor and racially and politically oppressed to associate with sympathetic counsel of their own choice.[21]

Student: An Essential Meeting, 14 Villanova L. Rev. 377 (1969); Lewis, "A Talk With Warren on Crime, the Court, the Country", *N. Y. Times Magazine*, pp. 34, 11-133 (Oct. 19, 1969); "Law Students Gain Successes in Aiding Indigent Clients Here", *N.Y. Times*, p. 72, col. 1 (Apr. 7, 1968); *N. Y. Times, supra*, p. 11, col. 2 (Aug. 30, 1969); *N. Y. Times*, p. 64, col. 3 (Sept. 14, 1969); "Boycott Affects Yale Law School," *N. Y. Times*, p. 52, col. 1 (Oct. 29, 1969).

[19] See *NAACP* v. *Button*, *supra* at 443; *Sanders* v. *Russell*, 401 F. 2d 241, 245 (5th Cir. 1968); *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280, 286 (5th Cir. 1964); *Sobel* v. *Perez*, 289 F. Supp. 392 (D.La. 1968) and the Brief of the Attorney General of the United States as Plaintiff-Intervenor therein; Remarks of Mr. Justice Brennan at Notre Dame Law School, *N. Y. Times*, p. 53, col. 1 (Feb. 9, 1969); Pollitt, *supra*, at 23-24; Note, *supra*, Harv. L. Rev. at 1721-1722; Alexander, *The Right to Counsel for the Politically Unpopular*, 22 Law in Trans. 19, 22-24 (1962); *N. Y. Times*, p. 60, col. 4 (Sept. 4, 1967).

[20] See *NAACP* v. *Button*, *supra* at 429-431; Casper, *Lawyers and Loyalty-Security Litigation*, 4 Law and Society Rev. 575, 581-582 (1969); Pollitt, *supra*; "Blacks Form Pro-Militant Legal Unit", *N. Y. Times*, p. 45, col. 1 (June 1, 1969); *N. Y. Times*, p. 48, col. 6 (Jul. 21, 1969); "Rights Group Aids 13 Panthers Here", *N. Y. Times*, p. 74, col. 1 (Aug. 5, 1969); Alexander, *supra*; cf. *United States* v. *Harpole*, 263 F. 2d 71, 82 (5th Cir. 1959); "The Revolt of the Civil Rights Division", Cong. Rec., p. 10705 (Dec. 16, 1969); *N. Y. Times*, p. 1, col. 6 (Aug. 28, 1969).

[21] See *Konigsberg* v. *State Bar*, 353 U.S. 252, 273; *NAACP* v. *Button*, *supra*; *In re Sawyer*, 360 U.S. 622; *Sanders* v. *Russell*, *supra*; Chafee, *Blessings of Liberty*, 157-176 (1956); Conference Working Group, *The Independence of the Bar*, 13 Law. Guild Rev. 158 (1953).

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The spectre of the nearly successful attempt to purge the politically unpopular from the bar during the McCarthy period is too familiar for this Court to ignore the dangers which inhere in the present example of political regulation. As the Committee on Law Reform of the Association of the Bar of the City of New York stated in its celebrated report on *Loyalty Oaths for Lawyers*:

> "The establishment of the oath requirement might lessen the freedom of the Bar to accept the responsibility of representing unpopular causes. At this time, when Communists are being more frequently called upon to appear in courts, it is essential that they should not be deprived of counsel of their own choice." *The Proposed Anti-Communist Oath: Opposition Expressed*, 37 A.B.A.J. 123, 125 (1951).

During the last decade political screening programs took a different form: this involved coercive efforts, including violence, to prevent the NAACP, the National Lawyers Guild and other organizations from providing local and out-of-state attorneys to fight racial segregation and oppression in the South.[22]

This experience demonstrates, as one observer concluded, that in periods or places of political repression, it has been the "ability of the profession to encompass" politically radical lawyers which "was crucial to its ability to provide representation" for minority and dissident groups.[23]

To permit political censorship of the profession in the form of New York's screening program not only critically affects the ability of minority and dissident groups to obtain vindication of their federal rights or an effective defense but, in a special sense, it also denies their right to freedom of speech. For, as this Court has recog-

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[22] See *supra*, p. 19, n. 19. See also *In re Brown*, 346 F. 2d 903 (5th Cir. 1965); Hammer, *"Yankee Lawyer Go Home"*, *N.Y. Times*, Sect. 4, p. 8, col. 1 (Mar. 12, 1967).

[23] See Casper, *supra* at 594-595; see also Countryman, *Loyalty Tests for Lawyers*, 13 Law. Guild Rev. 149, 157 (1953); Symposium, *The Right to Counsel and the "Unpopular Cause"*, 20 U. of Pitt. L. Rev. 727 (1959).

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nized, litigation provides the poor, the segregated and the politically unpopular with an available and inexpensive mode of expressing their social and political beliefs. See *NAACP* v. *Button*, *supra* at 428-429, 431, 444-445; *Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217; *United States* v. *Robel*, *supra* at 283 n. 1 (Mr. Justice White dissenting); *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; Casper, *Lawyers, The Supreme Court, Civil Liberties and Civil Rights* (to be published in Stan. L. Rev., Apr., 1970). This method of expression has become increasingly important and, in some circumstances, indispensable to many political movements which sometimes view the judiciary as the only responsive institution and meaningful forum in which questions of social justice can be resolved.

B. Under the First Amendment, No Political Test May be Imposed for Admission to the Bar

While, in the light of the constitutional infirmities next to be discussed, this case does not *compel* a decision upon the point, the increasingly critical importance of the First Amendment, the independence of the Bar, and the right to sympathetic counsel of minority and dissident groups (*supra*, pp. 15-20) justify a broad ruling by this Court that no political test whatsoever—even knowing membership in a political organization with the specific intent to advance its illegal purposes—may constitutionally be imposed upon applicants for admission to the Bar.

We recognize that this broad statement runs counter to the implications, at least, in the majority opinions of this Court in *Konigsberg* v. *State Bar*, *supra*, and *In re Anastaplo*, 366 U.S. 82. Factually, those cases may be distinguished on the ground that they involved questions concerning the Communist Party which has been treated as *sui generis* by this Court in the light of Congressional and judicial findings.[24] Nevertheless, we urge a reconsideration

[24] *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539; *Barenblatt* v. *United States*, 360 U.S. 109, 127-128; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 266 (concurring opinion of Mr. Justice Frankfurter).

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of the underlying assumptions because they are irrelevant to the concept of "good moral character," inevitably introduce ambiguous political considerations running counter to the nature and needs of our democratic society, and represent a departure from the sounder assumptions underlying this Court's decisions of a century ago in the justifiably famous cases of *Ex parte Garland*, 71 U.S. (4 Wall.) 333, and *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277.

Our analysis of the problem begins with the statement of a principle that will not be in dispute in this Court, namely, that any qualification for membership in the Bar, whether imposed by court or legislature, must, under the due process clauses of the Fifth and Fourteenth Amendments, have a "rational connection with the applicant's fitness or capacity to practice law." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239. As Mr. Justice Frankfurter added in his concurring opinion:

> "From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character'." *Id.* at 247.

Except for occasions of political stress, this standard of good moral character has been historically limited to questions of personal morality, reliability and honesty necessary to assure adequate representation of clients in litigation and otherwise. Thus, in the first *Konigsberg* case, Mr. Justice Black referred to "good moral character" as representing in California "an absence of proven conduct or acts which have been historically considered as manifestations of moral turpitude." *Konigsberg* v. *State Bar*, 353 U.S. 252, 263. Very recently the California Supreme Court reaffirmed this view in admitting to the Bar an applicant with a long series of arrests. *Hallinan*

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v. *Committee of Bar Examiners*, 421 P. 2d 76 (Cal. 1966); see also Cardozo, J. in *Matter of Rouss*, 221 N.Y. 81, 91 (1917).

But political beliefs and conduct have no connection whatsoever with one's "fair private character"—the significant phrase of *Ex parte Garland, supra* at 378—and hence, with the constitutional right to practice law. This Court recognized that fact in the companion case of *Cummings* v. *Missouri, supra* at 320, when it said of similar political disqualifications of clergymen:

> "It is manifest upon the single statement of many of the acts and of the professions and pursuits that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the profession and pursuits."

It is true that in difficult periods in this country attempts, sometimes successful, have been made to deprive lawyers of their right to practice because of their political activities,[25] some of which were deemed to be, and sometimes were, serious violations of law. Examples include the actions taken or proposed against lawyers in New York State following the Revolution,[26] the test oaths introduced after the Civil War to prevent the practice of law by lawyers who took up arms against the government,[27] and the so-called Cold War period of our own century.[28] But the fact that lawyers, like other groups, have subjected one another to oppression because of political activities

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[25] Rosenberg, *Constitutional Limitations on the Process of Admissions to the Bar, supra;* Koenigsberg and Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 Law Guild Rev. 111 (1951); Chafee, *supra.*

[26] See 2 Chroust, *The Rise of the Legal Profession*, 5-12 (1965).

[27] Koenigsberg and Stavis, *supra* at 119-120.

[28] Countryman, *Loyalty Tests for Lawyers, supra;* Brown & Fassett, *supra;* Conference Working Group, *The Independence of the Bar, supra* at 159-172.

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does not in any way make such political activities, whether they be criminal or not, an indicium of bad moral character.

Political conduct—even if it is ultimately held to be criminal—is not fungible with or in any way related to the concept of moral character for admission to the Bar. This is undoubtedly true as to institutionalized violations of the law, such as the case of a Selective Service registrant who refuses induction in order to obtain judicial review of the validity of his classification (cf. *Clark* v. *Gabriel*, 393 U.S. 256) or generally of any person who seeks to test the validity of a particular statute (see *Keegan* v. *United States*, 325 U.S. 478; *Douglas* v. *City of Jeannette*, 319 U.S. 157). Of course, whether or not the individual ultimately prevails in the criminal prosecution has no bearing on his moral qualifications for admission to the Bar. See *Report of the National Commission on the Causes and Prevention of Violence*, 90-91 (1969).

The same result obtains where an applicant has engaged in civil disobedience. Here both the complexity of the issues and historical support for such conduct belies any moral judgment. Thus in *Hallinan* v. *Committee of Bar Examiners*, *supra*, the court ruled that an applicant could not be excluded from the Bar on the basis of convictions for unlawful assembly, disturbing the peace, or criminal trespass in connection with civil rights demonstrations or for his beliefs in the efficacy of sit-ins to combat discriminatory employment policies. The court stated:

> "Whether these activities involve moral turpitude is dependent upon the issues involved and the motivation of the violator. Of course, we do not mean to condone disobedience of the law in any form; we mean only to express strong doubt that the leaders of the current civil rights movements are today or will in the future be looked upon as persons so lacking in moral qualifications that they should for that

reason alone be prevented from entering their chosen profession.

> To the extent that acts of civil disobedience involve violations of the law it is altogether necessary and proper that the violators be punished. But criminal prosecution, not exclusion from the bar, is the appropriate means of punishing such offenders . . . If we were to deny to every person who has engaged in a 'sit-in' or other nonviolent civil disobedience, and who has been convicted therefor, the right to enter a licensed profession, we would deprive the community of the services of many highly qualified persons of the highest moral character." *Id.* at 87.[29]

See also Douglas, *Points of Rebellion*, 95 (1970); *Report of the National Commission on the Causes and Prevention of Violence*, 91-118 (1969); Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 Yale L.J. 1352 (1969); but see *Application of Brooks*, 355 P. 2d 840 (Wash. 1960) *cert. denied*, 365 U.S. 813.

So also in *Schware* v. *Board of Bar Examiners, supra*, this Court assumed that even if the applicant had violated the Neutrality Act of 1917 by recruiting volunteers to go overseas to aid the Loyalists in the Spanish Civil War, such an offense would not warrant exclusion from the bar. 353 U.S. at 242-243.

But the most direct example involves this Court's decision in *Ex parte Garland, supra*, where a future Attorney General of the United States[30] successfully overturned a

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[29] See § AA 51-2.0 of the Administrative Code of the City of New York, which prohibits the denial of any license, right, benefit or privilege extended by the Code solely because of conviction for "act or acts arising out of any peaceful demonstration or other peaceful activity, the object of which is to resist discriminatory treatment in any place of public accommodation . . . or to achieve equal rights for all persons . . ."

[30] Garland, *Experience in the United States Supreme Court* (1898).

statutory disqualification for practice in the federal courts based upon his participation in the rebellion against the United States. As the dissenting opinion in this Court pointed out, nothing could have been more serious than the charges involved which included treason. Nevertheless, while the decision technically falls under the rubrics of bill of attainder and *ex post facto* law, it is a clear recognition that the serious political crimes on the part of Mr. Garland and other leaders of the Confederacy bore no rational connection with the issue of good moral character.[31]

The considerations which move men under certain circumstances even to take up arms against their government, as *Garland* and *Cummings* indicate, are not evidence of moral turpitude, as our own history so well illustrates. See Douglas, *supra* at 95. Professor Vern Countryman, in his masterly analysis of the problem many years ago, concluded that "[t]he power to license professions is not a power to license methods of governmental change." Countryman, *supra* at 156.

We submit, therefore, that even if New York were to rewrite its standards and to limit its interrogation to actual conduct in an attempt to meet tests of due process and of criminality, it would continue to violate the basic principle which we urge to this Court, namely, that no political associations, activities or statements may, consistent with the Fourteenth Amendment, obstruct admission to the Bar.

C. New York's Screening Program Violates this Court's Rule Requiring Precision of Regulation in the First Amendment Area

When measured against this Court's rule of precision, New York's screening program and its implementation by

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[31] See also *In re Baxter*, 2 Fed. Cas. 1043 (E.D. Tenn. 1866); *In re Shorter*, 22 Fed. Cas. 16 (D. Ala. 1865); *Ex parte Law*, 35 Ga. 285 (1866); but see *Ex parte Quarrier*, 2 W. Va. 569 (1866).

appellees is plainly revealed as a crude and oppressive mechanism for political censorship.

In *NAACP* v. *Button*, 371 U.S. 415, 438, the Court stated the governing principle, frequently reaffirmed thereafter,[32] that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

The "precision" rule is designed to safeguard the "breathing space" essential to the survival of First Amendment rights of free speech and free association (*id.* at 433; *Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539, 544; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604).

The rule has a particularly important function in cases involving political investigation because it erects a barrier against governmental interference with an individual's right of associational privacy, which "may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama*, 357 U.S. 449, 462; *Gibson* v. *Florida Legislative Comm.*, *supra*, at 544.

Where, as here, state regulation affects important public as well as private interests, "precision" is doubly crucial. Cf. *Sweezy* v. *New Hampshire*, *supra* at 265-267 (Mr. Justice Frankfurter concurring).

The decision of the majority below sanctioning New York's screening program violates the rule of "precision" in four major respects:

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[32] See *Aptheker* v. *Secretary of State*, *supra*, at 512, 513; *United States* v. *Robel*, *supra*, at 265; *Keyishian* v. *Board of Regents*, *supra*, at 603-604.

1. New York's Screening Program is an Overly Drastic Method of Regulation

Assuming *arguendo* that New York's objective was a legitimate one of preventing improper professional conduct, the destructive effect upon personal and public interests, previously noted, compels the state to choose a less drastic alternative than the course presently followed. For "[m]ere legislative preferences" are not sufficient justification for effectuating a state purpose "by means that [diminish] the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State*, 308 U.S. 147, 161; *Thornhill* v. *Alabama*, 310 U.S. 88, 96. "The breadth of legislative abridgment must be viewed in the light of less drastic means of achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488.

Therefore, New York, like Congress, "must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic society demand nothing less." *Robel* v. *United States*, 389 U.S. 258, 268; *United States* v. *O'Brien*, 391 U.S. 367, 377; Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969); cf. *Toth* v. *Quarles*, 350 U.S. 11, 23.

The dangers of political screening are well known. See *Schneider* v. *Smith*, 390 U.S. 17; *Keyishian* v. *Board of Regents, supra;* Douglas, *Points of Rebellion*, 17-33 (1970). Such programs are comprised of two elements—inquisitorial investigation and prior restraint—which have been found time and again by this Court to pose a severe threat to the free exercise of First Amendment rights.

The wholesale invasions of political privacy instigated pursuant to the federal loyalty-security program, which Mr. Justice Douglas characterized as "the most blatant violations of the First Amendment we have ever known" [*Brandenburg* v. *Ohio*, 395 U.S. 444, 456 (concurring opin-

ion)] serve to underscore the vulnerability of personal liberties when exposed to inquisition and possible sanctions by a government agency having a throttle-hold on an individual's job or professional career.

New York's exclusion from the Bar for past political beliefs or associations also operates in the manner of the classic systems of prior restraint, where *all* future speech is prohibited to ensure that no unlawful speech will take place. See e.g. *Carroll* v. *Princess Anne*, 393 U.S. 175; *Kunz v. New York*, 340 U.S. 290; *Thomas* v. *Collins, supra; Thornhill* v. *Alabama, supra;* Bruff, *Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 Hastings L.J. 129, 135 (1969). When viewed from the public interest in the independence of the Bar and the availability of attorneys willing to offer sympathetic counsel to the politically outcast, this element of prior restraint looms as the dominant vice in New York's screening program.

The apparent purpose of screening the political fitness of applicants to the New York Bar is to safeguard clients and courts from the possibility of unprofessional behavior by attorneys having disfavored political leanings. But the sweep of New York's program is too indiscriminate. It is certainly irrational to predict that an applicant will *engage* in unethical behavior when admitted because he does not *believe* in the form of government of the United States (or at least cannot "furnish satisfactory proof" to that effect).

Even if the scope of New York's screening program were confined to unlawful speech and associations, the intimidating aspects of such a program remain undiminished. The fact that appellees sit in *moral* judgment over the applicant's political activities (see discussion of *Schware* and *Hallinan, supra*, pp. 24-25), that the elements of unlawful speech and association are subtle and their application in particular cases, even by this Court, has

produced sharp differences of opinion (see *Scales* v. *United States*, 367 U.S. 203, 232; *Speiser* v. *Randall*, 357 U.S. 513, 535; *Thomas* v. *Collins*, 323 U.S. 516, 529-530) and that there is a possibility of misjudgment, mistake or intentionally biased fact finding which in almost all events would be binding on review by this Court [*Application of Patterson*, 353 U.S. 952, *on remand* 318 P. 2d 907 (Wash. 1957), *cert. denied* 356 U.S. 947; see also *Speiser* v. *Randall*, *supra*; *Garrison* v. *Louisiana*, 379 U.S. 64, 80-82 (Mr. Justices Black and Douglas concurring); *Thornhill* v. *Alabama*, 310 U.S. 88, 97] make prior screening of an applicant's political fitness, at the very least, an extreme procedure.

Whatever dangers exist, the state, as Judge Motley concluded, is amply protected by the less restrictive alternative available through criminal and disciplinary sanctions. See A. 204, cf. *Stanley* v. *Georgia*, 394 U.S. 557, 566-567; *Kunz* v. *New York*, *supra*.

Such alternatives would permit subsequent punishment for defined conduct, in the context of actual, not imagined or hypothetical, injury to the state and under procedures ensuring a fair, speedy and reliable determination. As Mr. Justice Brandeis wrote: "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of law . . ." *Whitney* v. *California*, 274 U.S. 357, 378 (concurring opinion). See also *Thomas* v. *Collins*, *supra*, at 538-543; *United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969) (Coffin, J. dissenting); cf. Monaghan, *First Amendment "Due Process"*, 83 Harv. Rev. 518, 543 (1970).

2. The Political Tests for Admission to the New York Bar Are Unconstitutionally Vague and Overbroad

The substantive tests for admission embodied in Judicial Law § 90(1)(a) and Rule VIII: "good moral character

and general fitness," and in CPLR 9406(1): "believes in the form of government of the United States and is loyal to such government" are impermissibly vague and overbroad.

a. *"Good moral character and general fitness"*

The statutory requirement of "good moral character" does not create constitutional problems if it is read in its ordinary sense, as, indeed, New York has generally done. See *infra*, p. 33. The vagueness and overbreadth arise, as Judge Motley indicated (A. 193-197) when there is imported into it the element of political fitness. The standard then becomes one which is "wholly lacking in 'terms susceptible of objective measurement'." *Keyishian* v. *Board of Regents*, *supra* at 604.

This is demonstrated by *Application of Cassidy*, 268 App. Div. 282, 51 N.Y.S. 2d 202 (2d Dept. 1944), *aff'd without opinion*, 296 N.Y. 926, 73 N.E. 2d 41 (1945), where an applicant was denied admission under this standard, in part, because of his "belief in the resort to force to overthrow the existing form of government of the United States". *Id.* at 284. Citing *People* v. *Gitlow*, 195 App. Div. 773 *aff'd*, 234 N.Y. 132, 1923, the court ruled that the First Amendment protections did not extend to belief in or advocacy of unlawful methods of change. *Application of Cassidy*, *supra* at 285-286. Admission to the bar was denied upon these grounds despite the fact of prior acquital of the applicant by a federal jury of a charge of conspiracy to overthrow the government. The court ruled that

> "acquittal in a criminal action cannot be deemed to be *res judicata* here upon any issue, for the purpose and scope of an inquiry to determine an applicant's character and fitness to become a member of the Bar are essentially different . . . Conduct not descending to the level of guilt of the violation of a criminal statute may well present an insuperable obstacle to admission to the Bar if such conduct evinces a lack

> of that 'character and general fitness requisite for an attorney and counsellor-at-law'." [33]

The *Cassidy* case illustrates the existence of a potential threat to the exercise of First Amendment rights when the "good moral character" standard is infused with political considerations; for unless one uses that standard in a traditional sense, the term "good moral character" becomes what Mr. Justice Black described in *Konigsberg* v. *State Bar*, 353 U.S. 252, 262-263, an "unusually ambiguous" and "vague qualification, which is easily adapted to fit personal views and predilections [and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law". Such a standard is constitutionally intolerable in the area of free expression where "standards for permissible statutory vagueness are strict". *NAACP* v. *Button*, *supra* at 432, 433; *Cramp* v. *Board of Public Instruction*, 368 U.S 278, 287; *Baggett* v. *Bullitt*, 377 U.S. 360, 374.

In upholding § 90(1)(a) and Rule VIII against charges of vagueness, the majority below relied upon the statement in the second *Konigsberg* case that the "burden of proof of good moral character" was a "requirement whose validity is not, nor could well be drawn in question". 366 U.S. at 40-41 (A. 151). But as Judge Motley points out (A. 189-190), the "good moral character" qualification was not challenged by Konigsberg, and the Court's attention was not directed toward the substantive validity of the phrase

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[33] This view has not been discarded. Thus, appellees' statement in their Motion to Affirm (p. 10) that the Committees "might . . . conclude" the implication being apparent that the Committees do not recognize any obligation—that an applicant who answered Question 26 (see *supra*, pp. 10-11) affirmatively should not be denied admission, absent a showing of imminent lawless action, gives current illustration of the breadth of the power appellees have arrogated to themselves under the "good moral character" standard.

"good moral character"; rather, it was concerned solely with the burden of proof requirement.[34]

Implicitly recognizing the ambiguity in its construction of the phrase "good moral character," the majority below also sought to give it clarity by referring to the "content [it had acquired] through years of administration" (A. 151). On the contrary, that "content", as reflected in the adjudicated cases from the beginnings of the New York Bar [35] relates to dishonorable conduct, lack of candor and misrepresentation by the applicant. The inclusion of "political fitness" is a relatively recent by-product of the McCarthy period which serves only to create ambiguity.

b. *"Believes in the form of government of the United States and is loyal to such government"*

1. References in CPLR 9406(1) to "believe in the form of government of the United States and is loyal to such government" are equally vague.

Their imprecision is demonstrated, as Judge Motley noted, by comparison with similar phrases found unconstitutionally vague in *Keyishian* v. *Board of Regents, supra* at 593 ("utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act"); and in *Baggett* v. *Bullitt, supra* at 361, 371-372 ("respect for the flag and institutions of the United States . . . and un-

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[34] The burden of proving good moral character, where that qualification embraces a concept of loyalty and political fitness, violates the proscriptions against such a procedure announced in *Speiser* v. *Randall, supra.* See also the discussion of the application of *Speiser* to the burden of proof requirement of CPLR 9406(1); *infra*, pp. 42-48.

[35] See *Cooper's Case*, 22 N.Y. 67 (1860).

divided allegiance to the government of the United States").[36]

Appellees in their Motion to Affirm (p. 9) have conceded, although somewhat equivocally, that the requirements of CPLR 9406(1) are unconstitutionally vague on their face. This concession was undoubtedly necessitated by the force of the *Keyishian* and *Baggett* decisions and by the ruling below that the vagueness of an almost identically worded oath appearing on the questionnaire (see Question 27(a) *supra*, p. 7) and promulgated on the basis of CPLR 9406(1)[37] deterred the free exercise of First Amendment rights by prospective applicants for admission to the New York Bar. See A. 162-163. Appellees have therefore acknowledged the unreality of the effort by the majority below to distinguish the Question 27(a) oath from CPLR 9406(1) because the former contains the word "principles" and the latter does not. Furthermore the statute poses no less a danger to First Amendment rights than does the oath. It is a political test, which the applicant must satisfy, not merely by a single affirmation, but by complete disclosure of First Amendment protected beliefs and associations. See A. 199.

The imprecision of CPLR 9406(1), like the defective oath involved in *Whitehill* v. *Elkins*, 389 U.S. 54, "makes possible oppressive and capricious application as regimes change." *Id.* at 62; see also *Baggett* v. *Bullitt*, *supra* at 373; *NAACP* v. *Button*, *supra* at 432-433; *Cramp* v. *Board*

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[36] Similarly, upon the authority of *Baggett* v. *Bullitt*, *supra*, a three-judge district court in Colorado invalidated an oath requiring Colorado teachers to promise that they will "teach, by precept or example, respect for the flags of the United States and of the state of Colorado, respect for law and order and undivided allegiance to the government of one country, the United States of America." See *Gallagher* v. *Smiley*, 270 F. Supp. 86 (D.Colo. 1967).

[37] See Brown & Fassett, *supra* at 490-491 indicating that CPLR 9406(1) "is the basis for" Question 27(a).

of Public Instruction, supra at 286-287. For, as with the Question 27(a) oath, there is no reason why applicants who oppose bicameral legislatures, the electoral college or the power of this Court to invalidate Congressional enactments or who are committed to the anarchist, monarchist or communist philosophies should not genuinely fear that their views may be deemed contrary to the belief and loyalty demanded by CPLR 9406(1). See A. 162.

The constraints imposed by CPLR 9406(1) upon the exercise of First Amendment freedoms are in no way lessened and certainly not "eliminated by the interpretation of that Rule as implemented by the Committee in the questionnaire submitted to each applicant" (Motion to Affirm, p. 9). Indeed, the fears of applicants are only heightened when they realize that pursuant to CPLR 9406(1) the Committees have conducted by means of the questionnaires and personal interviews searching inquiries into unorthodox political beliefs and associations.[38]

Appellees point to their most recent questionnaire as exemplifying their narrowing *but unspecified* interpretation of CPLR 9406(1). But appellees offer no reason why the statute should be construed in light of questions in existence for only six months, and in disregard of questionnaires used for more than 20 years or of those presently employed by the Third and Fourth Departments.[39] Appel-

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[38] Doubts as to the scope of CPLR 9406(1) are hardly dispelled by the case of *Application of Rosenberg* (1968) (unreported) where an applicant's admission was delayed for three months after his personal interview during which he was compelled to state the reasons for his opposition to the war in Vietnam. This case is discussed in Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights, 33, 38 n. 27a (1968).

[39] The Third Department questionnaire contains the following political interrogatory: "17. Do you believe in the form of and are you loyal to the Government of the United States?" (con't.)

lees have not disavowed the validity of their long standing practices and in any event the mere existence of CPLR 9406(1) prevents appellees from giving assurances that their successors will not reinstitute these practices. See *Whitehill* v. *Elkins, supra*, 62.

Moreover, neither the questionnaire generally, which is designed solely to obtain information and not to erect a substantive standard for admission, nor the specific political interrogatories, which are themselves under attack for vagueness and overbreadth, even purport to define the phrase "form of government", or what is meant by "believes in . . . and is loyal to such government". Indeed, the appellees have conspicuously failed to discuss any interpretation of these terms in their Motion to Affirm or at any prior stage of this litigation.

This Court may take judicial notice (cf. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 157) of the Record in the *Stolar* case, *supra*, which includes a copy of the Fourth Department questionnaire, containing the following series of sweeping political inquiries (see the Appendix pp. 23a-24a filed in *In the Matter of the Application of Stolar, supra*):

"17. State whether there are any favorable or unfavorable incidents in your life, whether at school, college, law school, business, or otherwise, not called for by the questions answered herein or disclosed in your answer thereto? If so, state the facts fully."

"18. State whether you have participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? If so, state the facts fully."

"19. Do you believe in the principles underlying the form of government of the United States?"

"20. State whether you have been or are a member of any party or organization engaged in propagating or pledged to effect changes in the form of government provided for by the United States Constitution, or in advancing the interests of a foreign country? If so, state the facts fully."

"21. Can you conscientiously, and do you affirm, without any mental reservation, that you have been and are loyal to the government of the United States?"

The Clerk's office for the Fourth Department, has, by letter and telephone confirmed the fact that these questions are presently in use.

The ephemeral nature of appellees' *present* "interpretation" is underscored by the conflicting "interpretation" given CPLR 9406(1) by the various Appellate Divisions and by the varying formulations which have been devised to replace the oath originally contained in Question 27(a). Thus appellees first offered, as a substitute, an oath reworded as follows: "Do you believe in the constitutional form of government of the United States?" (A. 217). This formulation, too, was rejected by the court below (A. 228). The question presently used is not appellees' "interpretation" at all, but that of the court below. Appellees are evidently about as uncertain as to the meaning of CPLR 9406(1) as are appellants.

Appellees' "interpretation" is constitutionally inadequate for a number of other reasons.

First, CPLR 9406(1) is so vague and ambiguous as not to be fairly or reasonably open to a limiting, plausible interpretation. See *Harrison* v. *NAACP*, 360 U.S. 167, 176; *NAACP* v. *Button*, 371 U.S. 415, 433; *Baggett* v. *Bullitt*, *supra* at 378.

Second, "it is settled doctrine that a statute trenching on freedom of association cannot be rescued from taint of unconstitutionality by administrative patchwork in order to arrive at a new statute." *Stewart* v. *Washington*, 301 F.Supp. 610, 613 (three-judge court, D.D.C. 1969). This Court's refusal to accept proferred limiting constructions to save the statutes involved in *Aptheker* v. *Secretary of State*, 378 U.S. 500, and *United States* v. *Robel*, *supra*, compels rejection of appellees' new "interpretation" of CPLR 9406(1).

Third, the recently revised questionnaire, in use in only two of New York's four judicial departments, is not an authoritative construction of CPLR 9406(1), even assuming the statute to be susceptible of constitutional definition.

This Court has required nothing less than a direct and "authoritative construction" by the state's highest court before entrusting the liberty of individuals to state authorities administering an apparently vague statutory scheme. See *Harrison* v. *NAACP, supra* at 138; *NAACP* v. *Button, supra* at 432; *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 155.[40]

2. CPLR 9406(1) also suffers from impermissible overbreadth in two principal respects.

First, it explicitly conditions the Committee's certificate and the Appellate Division's final order for admission solely upon an applicant's *beliefs.* New York has therefore chosen to tread heavily into a zone of privacy absolutely reserved to the individual. Compelling an applicant to believe in the form of government of the United States is, as Judge Motley correctly found, irreconcilable with the "constitutional axiom 'that one be permitted to believe what he will.' *American Communications Assn.* v. *Douds,* 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed 925 (1950)." (A. 197). See *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 642.

The decision below is in direct conflict with the principle reaffirmed in *Stanley* v. *Georgia, supra,* at 565 that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565. *Stanley* expressly adopts Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438, 478, that the "makers of our Constitution . . . sought to

[40] Appellees' "interpretation" of CPLR 9406(1) is far from the "authoritative construction" required by this Court. Not only is this "interpretation" not binding on the Appellate Divisions for the Third and Fourth Departments (see *supra,* p. 35, n. 39) but as the questionnaires for those departments demonstrate the scope of political inquiry authorized by CPLR 9406(1) is neither clearly defined nor a matter of consensus among the various Appellate Divisions.

protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." As Professor Meiklejohn stated:

> "A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm each citizen is sovereign." Meiklejohn, *The First Amendment Is An Absolute,* 1961 S. Ct. Rev. 245, 257.

This principle has been consistently adhered to by the Court, see *Schneider* v. *Smith, supra* at 25; *Thomas* v. *Collins, supra* at 531; *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304; *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 412 and 446-449 (Mr. Justice Black dissenting); *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496; *Girouard* v. *United States,* 328 U.S. 61, 68; *Watkins* v. *United States,* 354 U.S. 178, 196; *Schneiderman* v. *United States,* 320 U.S. 118, 144; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 266 (Mr. Justice Frankfurter concurring); *Speiser* v. *Randall, supra* at 536 (Mr. Justice Douglas concurring); *Brandenburg* v. *Ohio,* 395 U.S. 444, 450 (Mr. Justice Douglas concurring).

Second, CPLR 9406(1) is overbroad with respect to the nature of the prohibited political beliefs. It excludes from admission all applicants who do not or cannot prove that they believe in the form of government of the United States, that is, according to the majority below, that they subscribe to a belief in the "essentials, democratic government and change by lawful methods." (A. 162).

Obviously, then, the political test embodied in CPLR 9406(1) at the very least does not countenance belief in or advocacy of violent overthrow of government, though such beliefs and advocacy are unquestionably protected by the First Amendment from criminal punishment, see *Scales* v.

United States, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Yates* v. *United States*, 354 U.S. 298; *Brandenburg* v. *Ohio*, *supra* at 448-449, and from becoming the basis for a finding of moral unfitness, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; cf. *Keyishian* v. *Board of Regents*, *supra* at 607.

In predicating exclusion from the bar upon mere beliefs without distinguishing between "mere advocacy and incitement to imminent lawless action" (*Brandenburg* v. *Ohio*, *supra* at 449 n. 4), CPLR 9406(1) "sweeps within its condemnation speech which our Constitution has immunized from governmental control" (*id.* at 448).

CPLR 9406(1) is not saved from the constitutional infirmity of overbreadth by arguing, as the majority below does (A. 155), that the statute merely directs the admitting bodies to test whether an applicant can honestly take the constitutional oath of support.[41]

As Judge Motley stated (A. 207), this Court in *Bond* v. *Floyd*, 385 U.S. 116, held that First Amendment rights may not be restricted under the guise of testing the sincerity with which an individual can take an oath to support the Constitution and that the power to require such an oath "does not authorize a majority of the state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution." *Id.* at 132.[42]

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[41] Jud. L. § 466 requires each person, *upon being admitted to practice* by the Appellate Division, to take an oath set forth in N.Y. Const., Art. 13, § 1:

> "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ....., according to the best of my ability."

[42] See also *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at p. 17 (1955). (Con't.)

New York's screening program authorizes just what *Bond* forbids; the sincerity with which an applicant can swear to support the Constitution is tested by the orthodoxy of his political beliefs and associations through an unrestricted search of his political past. This testing process is particularly noxious in the area of bar admissions because, for the most part, applicants have just completed law school and their undergraduate education during which they were encouraged to challenge and were free to reject every precept and value in our society.

The oath, as involved in this case, differs substantially from a prospective pledge of support, see *Knight* v. *Board of Regents, supra.* Here the oath, applied through the medium of CPLR 9406(1), is transformed into a retrospective loyalty test. This raises substantial questions as to whether the oath, as a test rather than a mere promise, meets First Amendment requirements of precision, see Note, *Loyalty Oaths,* 77 Yale L. J. 739 (1968). But certainly this retrospective application of the oath through CPLR 9406(1) and based on past lawful beliefs and associations violates the constitutional proscription against bills of attainder, and *ex post facto* laws. See *Ex Parte Garland,* 71 U.S. (4 Wall) 333; *United States* v. *Brown,* 383 U.S. 437.

Finally, the majority below errs by acknowledging the imprecision of CPLR 9406(1), (A. 154, 156), but then nevertheless sustaining the statute on the assumption that it will be properly implemented by appellees. This is wholly

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Appellees take a position in this case contrary to the one adopted by New York in its Motion to Dismiss or Affirm in *Knight* v. *Board of Regents,* 390 U.S. 36 *aff'd per curiam* 369 F. Supp. 339 (S.D. N.Y. 1967) where its was asserted that the constitutional oath involved merely "a promise of future conduct" (p. 7) and would not proscribe "abstract advocacy of violent overthrow of the government." (p. 10).

insufficient protection for First Amendment rights. See *NAACP* v. *Button*, *supra*, at 433, 435; *Whitehill* v. *Elkins*, 389 U.S 54, 61-62; *Smith* v. *California*, 361 U.S. 147, 151; *Speiser* v. *Randall*, 357 U.S. 513, 526. Reliance upon the self-restraint of the appellees is wholly unacceptable, see *Baggett* v. *Bullitt*, *supra* at 373-374, in this area where experience has shown that attorneys and law students are particularly susceptible to being stereotyped by the political beliefs of their clients and other attorneys with whom they associate and that, like prosecutors, those in charge of regulating the Bar, too, are human. See *Cramp* v. *Board of Public Instruction*, *supra* at 286-287; *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954) *rev'd* 348 U.S. 978; *Schware* v. *Board of Bar Examiners*, *supra*; *Dombrowski* v. *Pfister*, 380 U.S. 479, 495 n. 12; *Loyalty Oaths for Lawyers: Opposition Expressed*, 37 A.B.A.J. 123, 125; see also *supra*, p. 19, n. 20.

3. CPLR 9406(1) Unconstitutionally Imposes Upon Each Applicant the Burden of Proving His Belief in and Loyalty to the Form of Government of the United States

The majority below holds that CPLR 9406(1) does not unequivocally place the "true" burden of proving loyalty on the applicant, and that if it does, such a burden is not unconstitutional (A. 152).

1. The first holding is contradicted by the statute's wording which in contrast to the statutory provision considered in the second *Konigsberg* case is clear in this regard.[43] The leading commentators on the CPLR have stated that

> "every qualified applicant does have a right to practice law but that it is entirely appropriate to require him to prove his qualifications. The Court is justified

[43] Cal. Bus. & Prof. Code § 6064.1 merely provided that no person may be certified for admission to the California Bar "who advocates the overthrow of the Government of the United States or of this State by force, violence or other unconstitutional means."

in placing the burden on the applicant to reveal all his activities and associations." 8 Weinstein, Korn, Miller, *New York Civil Practice* § 9404.05 (1968).

There is no indication that the authors of CPLR 9406 intended to exempt subsection (1) dealing with belief in and loyalty to the form of government from the full burden of proof requirement unquestionably applicable to subsections (2)-(4) dealing with citizenship, residence and the other statutory and regulatory qualifications.[44]

The ruling of the majority below is inconsistent with its own finding that CPLR 9406 implements the good moral character and general fitness requirements of Jud. L. § 90(1)(a) and Rule VIII (A. 145). The direction of 9406 that an applicant "shall furnish satisfactory proof" undeniably places the full burden of proving good moral character and general fitness on the applicant.[45] There is no basis for finding that the same phrase is equivocal as to

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[44] See *Matter of Lober*, 5 A.D. 2d 789 (2d Dept. 1958) [admission denied for failure to furnish satisfactory proof of New York residence for six months prior to filing application, as required by CPLR 9406(3)]; *Application of Schiff*, 163 N.Y.S. 2d 382 (2d Dept. 1958) (same); *Application of Kerno*, A.D. 2d 972, 151 N.Y.S. 2d 29 (2d Dept. 1956) (same); *Application of McDonough*, 280 App. Div. 866, 113 N.Y.S. 2d 781 (2d Dept. 1952) (same); *Application of Darter*, 6 A.D. 2d 696, 174 N.Y.S. 2d 335 (2d Dept. 1958) (admission denied for failure to prove five years practice in state of prior residence, as required by Rule VII of the Rules of the Court of Appeals, Jud. L. App.); *Matter of Harvey*, 309 N.Y. 46 (1955) (same).

[45] See *Konigsberg* v. *State Bar*, 366 U.S. 36, 40-41, n. 4; *Application of Appelman*, 280 App. Div. 865; 113 N.Y.S. 2d 780 (2d Dept. 1952); Weinstein, Korn, Miller, *supra;* Carmody-Forkosch, *New York Practice* § 76 p. 64 (8th Ed. 1963).

That applicants bear the burden of proof of good moral character was expressly acknowledged at p. 64 of the brief submitted by the Attorney General of New York in *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96.

the burden of proof for belief in and loyalty to the form of government.[46]

But no matter how the burden is formulated,[47] the pressures on the law student or applicant to "steer far wider of the unlawful zone" (*Speiser* v. *Randall*, *supra* at 527) are overpowering. That is because he understands that the men before whom he must bring forth "satisfactory proof" of the morality and lawfulness of his political associations and beliefs are men who have his professional reputation and career in their hands and who are very likely to be out of touch with, if not hostile to, contemporary political and social movements.[48]

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[46] See *The Proposed Anti-Communist Oath: Opposition Expressed*, 37 A.B.A.J. 123, 124; Weinstein, Korn, Miller, *supra*; cf. *Matter of Brennan*, 230 App. Div. 218, 228, 243 N.Y.S. 705 (2d Dept. 1930).

[47] The appellees and the court below contend that the burden is "merely one of initially coming forward with some evidence" (Motion to Affirm, p. 9). This extraordinarily vague formulation, even if equated with the standard of a prima facie case, is indistinguishable in effect from the burden of proof requirement invalidated in *Speiser* v. *Randall*, *supra*. Here, as in *Speiser*, the applicant's proof of loyalty is subject to rebuttal which shifts to the applicant the ultimate burden of proof. Cf. *Konigsberg* v. *State Bar*, 366 U.S. 36, 40-41 n. 4 and 80-81 (Mr. Justice Brennan dissenting).

[48] This Court may take judicial notice of the fact that the membership of the Committees does not represent a racial, economic, age, social, or political cross-section of the community. Many, if not most, are members of the "established" Bar which has been sharply criticized for political conservatism in the past by men such as Erwin Griswold and Chief Justice Stone and recently by law students in major schools throughout the country. See Griswold, *The Legal Profession in the United States*, 25 (1965); Stone, *supra*; *Roberts*, *supra*, 14 Villanova L. Rev. at 377; *Weckstein*, *supra* at 267, 270-271; see also *supra*, p. 18, n. 17. The existing gap in experience and values between the Committees and applicants will become more menacing as the number of law students from minority groups increases. See *N. Y. Times*, p. 11, col. 2 (Aug. 30, 1969); "Boycott Affects Yale Law School", *N. Y. Times*, p. 52, col. 1 (Oct. 29, 1969).

JudgeMotley accurately pointed to the burden of proof requirement in CPLR 9406(1) as the "heart" of the case (A. 199). This requirement provides the mechanism for appellees' practice of selectively intensifying the political interrogation for those applicants whose political associations and beliefs do not conform to appellees' standard of orthodoxy.

Thus, appellees may fasten upon a controversial association or belief disclosed by the applicant or discovered by the Committee's independent investigation as a basis for a finding that the applicant has not *yet* met his burden.[49] Compare *Konigsberg* v. *State Bar*, 366 U.S. 36, 75-76 (Mr. Justice Black dissenting). As a consequence of such a finding the applicant is compelled to explain in detail and to fully justify those associations or beliefs in an attempt to exorcise any doubts engendered in the Committee re-

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[49] Two recent cases provide alarming illustrations of appellees' discriminatory application of the burden of proof requirement.

One involved the appellant Kaimowitz who submitted his application after the decision below. He was prevented from being admitted with his class of applicants in June, 1969 and was instead subjected to further hearings and intensive interrogation before he was ultimately admitted on December 18, 1969 by the Appellate Division, Second Department, over the Committee's adverse recommendation. The sole bases for his being singled out for delay and intrusive inquiry were (1) his joining several other writers in 1964 in a strike against their employer, a magazine, over differences on editorial policy; (ii) his participation in 1965 with other summer instructors employed by the Southern Teaching Program sponsored by Yale University in an on-campus, peaceful assembly to protest the educational policies of Bishop College, an all-black institution located near Dallas, Texas, to which they were assigned; and (iii) his objection to Canon 16 of the now superseded Canons of Ethics on the grounds that in requiring an attorney to terminate his relationship with a client who persists in courtroom misconduct the Canon violates the Sixth Amendment. Based on the latter two matters, the Committee concluded that Kaimowitz had failed to establish his fit-

garding his political fitness.[50] The effect of this is to impermissibly impose the burden on the applicant of proving the legality of these associations. See *Dombrowski* v. *Pfister, supra* at 494-496; *Hasket* v. *Washington*, 294 F. Supp. 912, 915, 916-917 (D.D.C. 1968) (Wright, J. concurring).[51]

This procedure, with its potential for arbitrary suppression of political liberties, prompted Judge Motley's conclusion that

> "[t]he burden of proving loyalty here, as in *Speiser*, can have but one effect on a prospective lawyer's First Amendment freedoms; and that is a chilling effect if not a freezing one." (A. 220, see also A. 201).

2. The majority's alternative position is an unsuccessful attempt to avoid the force of *Speiser* v. *Randall, supra*. It argues that unlike, applicants for tax exemption, candidates for admission are seeking a "public position by virtue

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ness. The order of the Appellate Division admitting Kaimowitz is unreported. Prior to that order a motion made to the court below (Rec. Doc. No. 29) seeking its intervention was denied on the basis of paragraph 6 of its Judgment (A. 228).

The second case involved an applicant who was also singled out for delay and further investigation by the Committee for the First Department as a result of a personal interview during which the applicant's disclosure of his participation in anti-war marches prompted the Committee to compel him to state the reasons for his opposition to the war in Vietnam. After a three-months delay the applicant was admitted. See *Application of Rosenberg* (1st Dept. 1968) (unreported). See *supra*, p. 35, n. 38.

[50] Question 26 (*supra*, pp. 10-11) is another good example of this practice. An affirmative answer to subsection (a), without more, automatically places upon the applicant the burden of explaining to the Committee's satisfaction that his was lawful association. See *infra*, p. 61.

[51] This procedure was the subject of Circuit Judge Wright's concurring opinion in *Hasket* v. *Washington, supra*. Judge Wright held that teachers refusing to swear to an oath of non-membership in organizations advocating violent overthrow could not constitutionally be compelled to bear the burden of rebutting an adverse presumption arising from such refusal.

of which they could, if evilly motivated, create serious danger to the public." A. 152 quoting from *Speiser* v. *Randall, supra* at 527.

But the premise of this argument has been thoroughly rejected by this Court. States may not condition governmental employment, licenses or benefits of any kind on the surrender of First Amendment rights. See *Keyishian* v. *Board of Regents, supra* at 605-606; *United States* v. *Robel, supra* at 264-266; *Schware* v. *Board of Bar Examiners, supra* at 239; and see Reich, *The New Property*, 77 Yale L. J. 773 (1963); Van Alstyne, *The Demise of the Right-Privileged Distinction in Constitutional Law*, 81 Harv. L.Rev. 1439 (1968).[52] Nor is this case distinguishable from *Speiser* because infringement of First Amendment rights here is an unintended and incidental result of state regulation of the Bar. "For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button, supra,* at 439; *Konigsberg* v. *State Bar*, 353 U.S. 252, 269; see also *Shelton* v. *Tucker*, 264 U.S. 479, 488-489.

A member of the Bar is not a public employee or official. See *Ex parte Garland, supra* at 378; *Spevack* v. *Klein*, 385 U.S. 511. He does not represent the government or the administration of justice in the course of his profession.[53]

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[52] *Garner* v. *Board of Public Works*, 341 U.S. 716; *Gerende* v. *Board of Supervisors*, 341 U.S. 56, and *American Communications Association* v. *Douds*, 339 U.S. 382 were distinguished in *Speiser* v. *Randall, supra* at 27. To the extent that these cases may have been thought to support the position of the majority below, we believe that they have been overruled in cases decided since *Speiser*. See *Keyishian* v. *Board of Regents, supra; United States* v. *Brown, supra; Whitehill* v. *Elkins, supra.*

[53] One of the "significant omissions" in the newly adopted ABA Code of Professional Ethics found by a leading commentator involves Canon 7 of that Code, declaring that "[a] lawyer should represent a client zealously within the bounds of law". He found that

> "[n]owhere in the [new] Canons, in the disciplinary rules, or in the ethical consideration have I found the phrase 'minister

Indeed, he frequently stands as a protective barrier between the Government and his client. At times he may be required to defy a court order or violate or recommend the violation of a law or border upon contempt where he in good faith believes it to be the only way he can protect his client's constitutional rights.

Nor is there any support in experience or logic for the majority's assumption that *lawyers, as such,* pose a particular threat to the public safety. See discussion, *supra,* pp. 21-26. Even supposing that certain dangers exist, they are undoubtedly only a remote possibility. Therefore, New York may not protect its courts or the public by placing the burden of proving loyalty upon applicants or by employing other methods which deter the exercise of First Amendment rights where there is a less restrictive alternative available. See *supra,* p. 30. As Judge Motley found below, criminal and disciplinary sanctions afford just such a precise, narrow and wholly adequate means of protection (A. 204). See also *Konigsberg* v. *State Bar,* 344 P. 2d 777, 780, 782 (Traynor, J., dissenting); *Brown* v. *Fassett, supra,* at 505-508.[54]

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of the law' [old Canon 32] or 'officer of the law' [old Canon 22] or other similar phrase characterizing the lawyer's relationship to the legal system that might raise a question of a competing or even overriding standard, when the lawyer is attempting to define the kind of conduct on behalf of his client that falls 'within the bounds of the law'." Thode, *Canons 6 and 7: The Lawyer-Client Relationship,* 48 Tex. L. Rev. 367, 371 (1970).

[54] In rejecting loyalty oaths for screening the political fitness of members of and applicants to the Bar, the Association of the Bar of the City of New York concluded:

> "The existing means of discovering and punishing illegal or professionally improper conduct, by presenting specific charges and supporting evidence, are ample . . . to meet any danger to our government or disgrace to our profession." *The Proposed Anti-Communist Oath: Opposition Expressed,* 37 ABA J. 123 (1951). (Con't.)

**Applied, New York's Stautory Scheme Vio-
es the Rule of Precision by Authorizing a
eeping Political Inquiry Without Probable
use and Without Other Sensitive Procedural
ols**

e appellees have created an investigational apparatus
lacking "sensitive tools" (*Freedman* v. *Maryland*,
S. 51, 58; *Speiser* v. *Randall, supra* at 525) designed
iate the dangers of political inquiry.

political fitness is a relevant criterion for admission
political screening program is a permissible method
termining that fitness, then it is imperative that the
atus implementing this program incorporate suffi-
precise standards and procedures to ensure that
ocess of regulation does not itself abridge freedom
ression and destroy the very interests which it has
nstituted to protect. Appellees' investigational ap-
s fails to meet the constitutional requirement of pre-
because (a) applicants with controversial or unortho-
olitical associations may be discriminatorily singled
r intensive interrogation and delayed admission, (b)
pplicant is compelled to divulge his political past
e the absence of any basis in the record or probable
to believe that he has engaged in unlawful political
ies and (c) the political interrogatories on the ques-
ires and the scope of inquiry permitted by the "home
ffidavits and personal interviews unreasonably deter
ants from exercising their First Amendment rights.

956, a Special Committee on the Matter of Communist Law-
the Committee on Grievances of the same Association re-
a proposal that persons who are Communists be excluded
dmission to the bar. The conclusion again was that ample
ons are afforded by disbarment remedies for "lawyers en-
n Communist activities contrary to their oaths to uphold the
ation." This view was concurred in by the distinguished
nt of the Association, Allen T. Klots and adopted by the
tion. See 11 *The Record of the Association of the Bar of
of New York*. 45-47 (1956).

a. *The power to discriminatorily intensify the investigation and delay admission*

There are no procedural or substantive checks on the breadth or depth of the appellees' inquiry; each applicant is subject to a limitless and roving search of his political life. Akin to a general warrant, appellees' investigatory license sanctions an indiscriminate search based on their political biases and predilections.

Appellees, freed from formal or informal restraints, reward those applicants whose political orthodoxy conforms to that of their own and penalize non-conforming applicants with intensive political examination. Thus an affirmative answer to question 26(a) or an unorthodox association, belief or activity disclosed in the various other interrogatories on the questionnaire, in response to oral questioning during the personal interview, or by third-party affiants or discovered by the Committee's independent investigation may trigger prolonged investigation, unlimited and indiscriminate political interrogation and extensive delay in the final determination of an applicant's qualifications.

"It is clear", commentators on CPLR 9406(1) have concluded,

> ". . . that the applicant may be questioned about his affiliations with any group which might be considered subversive. He must reveal fully his views and past associations." *Weinstein, Korn, Miller, supra* ¶ 9406.03

In contrast to the unobstructed road to admission facing an applicant whose associations could not possibly be considered "subversive" and whose political activities, by their orthodoxy, only serve to fortify his showing of belief in the form of government, the applicant who reveals controversial associations or activities is subjected to probing interrogations pursuant to unspoken accusations. For the latter class of applicants the undirected inquiry is automatically transformed into an accusatory proceeding in

which the applicant must prove the lawfulness of his associations or disprove the appellees' assumption of the unlawfulness of the organizations involved.

At this point, the inquiry begins to feed on itself. In response to interrogation or in a self-exorcising effort to disclose every facet of his association an applicant may reveal radical beliefs and speech abrasive to appellees' concept of belief in and loyalty to the form of government.

As a result new and broader areas are opened for appellees' unhesitating exploration. As Chief Justice Traynor put it,

> "Inquiry on the issue of advocacy of the unlawful overthrow of government is a greedy camel; it does not easily take its leave. It has a way of moving on into the domain of lawful economic and political beliefs, speech and activity." *Konigsberg* v. *State Bar,* 344 P. 2d 777, 780, 782 (dissenting opinion).

This practice has the "substantial deterrent effect" against which Mr. Justice Black warned in his dissenting opinion in the second *Konigsberg* case:

> "If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid associations with any organization that advocates anything at all somebody might possibly be against, including groups whose activities are constitutionally protected under the most restricted notion of the First Amendment. And, in the currently prevailing atmosphere in this country, I can think of few organizations active in favor of civil liberties that are not highly controversial." 366 U.S. at 73-74.

Mr. Justice Black's warning applies equally to the many law students, applicants and young lawyers working for federally funded organizations providing legal services

for the poor. To begin with, these organizations have not generally received a favorable welcome from the local commercial Bar.[55] Furthermore, as the poor have become more militant and politically active, their cause has become more controversial.[56]

In this setting the newly proposed rules of the Appellate Division First Department governing organizations and associations providing legal services for the poor [see Jud. L. § 495(5)] is particularly threatening. Thus subsection (d) of section 608.8 of these proposed rules entitled "Annual Reports and Contents Thereof" requires such an organization to set forth the nature of its programs and circumstances of its services which have involved law students and the names and addresses of such law students.

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[55] Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available"*, 48 Tex. L. Rev. 285 (1970); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 Harv. L. Rev. 805, 843-845 (1967); Comment, *OEO Legal Services Program Unacceptable to New York Court*, 66 Mich. L. Rev. 389 (1967).

[56] Thus the legal services unit of an O.E.O. sponsored organization in Newark, New Jersey was accused and, after investigation, finally exonerated of improper involvement in the ghetto uprising in 1967. See *N. Y. Times*, p. 43, col. 5 (Dec. 16, 1967); see also "Houston to Avoid Rights Legal Aid", *N. Y. Times*, p. 32, col. 3 (Sept. 20, 1966); "Rebel Rights Aid Forced To Resign", *N. Y. Times*, p. 1, col. 7 (Oct. 2, 1969).

In New York City, federally funded organizations and the appellant organizations have provided legal services to blacks and Puerto Ricans living in ghetto areas who have engaged in rent strikes, welfare center sit- ins and school boycotts. They have also provided legal assistance to the poor fighting for community control of public schools, probably the most politically inflammatory issue in the city's history. Other examples involve legal aid to the students who participated in the protest demonstrations at Columbia University in 1968 and to a group of young Puerto Ricans who recently occupied a church which refused to allow the group to use part of its premises for free breakfasts for poor children in the neighborhood.

Subsection (e) of the same section requires the organization to make the following report:

> "Where the legal services involved representation of persons or advocacy in connection with social, economic, civil rights, reform or group programs, movements, goals or protests, there should be included a statement of the nature of the program, project or protest involved and the results sought to be achieved, together with a statement of the nature of the interest or involvement of the corporation, association or organization in the particular program, project or protest, including a specification of its work and activities in the particular matter during the reporting period." [57]

With reputation and employment opportunities, not to speak of the right of political privacy, at stake," [i]t would be a bold [attorney or prospective attorney] who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." *Keyishian* v. *Board of Regents, supra* at 601.

b. *The Absence of Probable Cause*

New York's statutory scheme authorizes invasion of an applicant's personal and political privacy without probable cause or foundation for inquiry.

This is precisely the kind of inquiry against which the Fourth Amendment is directed. For the constitutional prohibition of unreasonable searches and seizures has its historical roots in the investigations of political and religious dissenters—a situation similar to the present problem—at least in the political field. *Boyd* v. *United States,* 116 U.S. 616, 625-628; *Stanley* v. *Georgia, supra* at 598-599 (Mr.

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[57] These rules also prohibit, unless specifically authorized by the Appellate Division, the regulated organization or association from "engag[ing] in any political, lobbying, or propagandistic activities in behalf of any person, association or group of persons or furnish the services of an attorney for such purposes." See § 608.7(d).

Justice Stewart concurring). As Mr. Justice Stewart pointed out in *Stamford* v. *Texas*, 379 U.S. 478, 482, the roots of the Fourth Amendment "go far deeper" than the general warrants of the pre-revolutionary period in this country or in England. They are to be found in the Tudor period where "officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent . . ."

The purpose of the Fourth Amendment was to safeguard the security of individuals against such arbitrary invasion by government officials, particularly in the religious and political areas, clearly the most sensitive to such abuse. The method imposed by the Constitution was the requirement of a warrant based upon probable cause or other reasonable basis for making such an inquiry in a particular case. The issue has been the subject of litigation most frequently in areas of criminal investigation unrelated to the First Amendment. This is for a variety of reasons, including the relative recency of the application of the First Amendment to the States (see *Gitlow* v. *New York*, 268 U.S. 652) and of the incorporation of the search and seizure provisions of the Fourth into the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643.

It is obvious, however, in the light of Anglo-American history, that the principles underlying the Fourth Amendment's proscription of unreasonable searches and seizures should be applied most liberally for the protection of the citizen in the area of the First Amendment. Cf. *Katz* v. *United States*, 389 U.S. 347, 350 n. 5. If this is true where even limited disclosures of political associations or activities are involved (see, *e.g.*, *Gibson* v. *Florida Legislative Committee*, *supra*), it is even more important to apply the rule where, as here, the demanded disclosures are virtually unlimited.

The few cases involving admission to the Bar which have reached this Court have not directly adjudicated this

issue; it appears neither to have been directly raised nor was there an adequate basis for doing so. Thus, in the second *Konigsberg* case the inquiry was a limited one relating to membership in a single named political organization; the committee had independent evidence on the subject and the Court noted "gaps in the evidence presented" by the applicant, *supra* at 45. In the *Anastaplo* case, *supra,* where the applicant appeared *pro se,* the Court again was dealing with Communist Party membership, and referred to the committee's "good faith belief in the need for exploratory or testing questions of the applicant," *id.* at 90. We note these distinctions not to indicate acquiescence in an inquiry with respect even to Communist Party membership, but because it is a distinction which the Court has regarded as material.

Passing the earlier Bar cases, which cast little light upon the issue as it is squarely posed here, the application of the "probable cause" principle to this case is not only consistent with the decisions in the basic search and seizure cases but with this Court's decisions in cases involving other types of governmental investigation into associations.

The point was made most explictly in an earlier decision of this Court in *Barenblatt* v. *United States, supra* at 134, where Mr. Justice Harlan, after reciting evidence establishing contemnor's membership in the Communist Party, stated:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking any probable cause for belief that he possessed information which might be helpful to the Subcommittee."

Subsequently, in *Gibson* v. *Florida Legislative Committee, supra* at 537, the Court prohibited an invasion of associational privacy in the absence of "an adequate foun-

dation for inquiry."[58] Such a foundation, said the Court "is an essential prerequisite to demonstrating the important, substantial and subordinating state interest necessary to sustain its right of inquiry . . .," *id.* at 553; the dissenting opinion in that case did not question this general principle but differed as to whether a foundation had not, in fact, been laid by the Committee's witnesses, *id.* at 578. Mr. Justice Douglas, concurring, stated:

> "Whether the problem involves the right of an individual to be let alone in the sanctuary of his home or his right to associate with others for the attainment of lawful purposes, the individual's interest in being free from governmental interference is the same, and, except for the limited situation where there is 'probable cause' for believing that he is involved in a crime, the government's disability is equally complete." *Id.* at 569.

Such a foundation, this Court has held, must be established upon independent,[59] relevant [60] and substantial [61] evidence. *Cf. Uphaus* v. *Wyman*, 360 U.S. 72, 79.

This case is an even stronger one than *Gibson* for requiring an adequate foundation. The respondents are not merely collecting data for future legislation; they are possessed of an adjudicatory power to determine whether an applicant has engaged in unlawful political conduct. See *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96. Since a proceeding which involves such a determination is by its nature accusatory—the applicant is the target of

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[58] In addition to the term 'foundation," the Court characterized the requirement by such descriptive terms as "nexus" and "probable cause," *Gibson* v. *Florida Legislative Committee*, *supra* at 545.

[59] *Sweezy* v. *New Hampshire*, *supra* at 255, 261 (Mr. Justice Frankfurter and Harlan concurring).

[60] *De Gregory* v. *New Hampshire Attorney General*, *supra*, 830.

[61] *Gibson* v. *Florida Legislative Committee*, *supra* at 555, 556 and n. 7; *Speiser* v. *Randall*, *supra*, 529.

investigation—absence of an adequate foundation violates the applicant's due process rights to notice of charges and to confrontation.[62] *Cf. In re Ruffalo*, 390 U.S. 544, 550-551; *Jenkins* v. *McKeithen*, 395 U.S. 411.

The unjustified and unwarranted intrusion into the privacy of applicants would be a novel doctrine even if this case involved the most compelling state interests—public health and public safety; see *Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *Seattle*, 387 U.S. 541; *Katz* v. *United States*, *supra*; *Mapp* v. *Ohio*, 367 U.S. 643. Admission to the Bar does not, however, involve any comparable damage to the state. On the contrary, the danger is to the subject of the search, who has been and is subjected by this intrusion to a prior restraint in the exercise of his First Amendment rights. See *Marcus* v. *Search Warrant*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Freedman* v. *Maryland*, 380 U.S. 51; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155 n. 4, 159 (Mr. Justice Harlan concurring).

c. *Appellees are authorized to conduct a sweeping and indiscriminate investigation of an applicant's personal and political life*

1. The breadth of the appellees' investigatory power as authorized by New York's statutory scheme "pass[es] the outermost bonds of reason." *Schneider* v. *Smith*, *supra* at 25 (Mr. Justice Fortas concurring). The inquiry, oral or written, and conducted under the threat of perjury prosecution or delay or denial of admission, may delve into any area, political, social, religious, professional, family, sexual or otherwise. (See A. 172-184); *Application of Brennan*,

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[62] In due process terms, there is no logical distinction between disbarment and denial of admission; both affect substantial, legal interests of the individual. See *In re Ruffalo*, 390 U.S. 544; *Hallinan* v. *Committee of Bar Examiners*, *supra*; *cf. Greene* v. *McElroy*, 360 U.S. 474; *Schneider* v. *Smith*, *supra* at 25; *Speiser* v. *Randall*, *supra* at 425-526; *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191.

supra; 8 Weinstein, Korn, Miller, *supra* at ¶¶ 9404.04-9404.06; Brown & Fassett, *supra* at 492-495; Jackson, *Character Requirements for Admission to the Bar*, 20 Fordham L. Rev. 305, 316 (1961).[63]

Such a sweeping survey of an applicant's life, as this one authorized by the New York statutory scheme, violates the constitutional safeguards of personal and political privacy and deters the free exercise of First Amendment rights. It rounds up more information than is relevant or material to any legitimate state interest and touches many areas in which the state has no interest at all. See *Shelton* v. *Tucker, supra; Schneider* v. *Smith, supra; NAACP* v. *Alabama, supra; Bates* v. *Little Rock*, 361 U.S. 516; and *supra*, pp. 38-40.

2. Similarly, the particular questions sustained by the court below, Questions 26 and 27(a) (*supra*, pp. 10-11) as revised and Question 27(b) (*supra*, p. 7) in its original form, constitute an unwarranted invasion of the applicant's political privacy.

Revised Question 27(a), like Question 31 (*supra*, p. 7) requires the applicant "to engage in soul-searching of his

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[63] As Judge Motley (A. 172-184) illustrates, until recently the questionnaires specifically required each applicant to disclose *every* association, belief, speech, published writing and activity of *every* kind which he had ever made, held or been engaged in during his lifetime. Applicants were also required to write 100 word essays under oath on what they believe to be the "principles underlying the form of government of the United States." Compare Mr. Justice Fortas' concurring opinion in *Schneider* v. *Smith, supra* at 27.

In addition, after the commencement of these actions, appellees began to issue a form letter to applicants, who were required to fill in the address of their draft boards and to sign it before a notary public. The letter authorized any of the appellees or their agents to have access to the applicant's Selective Service file for examination and copying. The majority noted "considerable doubt about the propriety of this" but refused to pass upon it because this practice was not specifically alleged in the complaints (A. 168, n. 9) although clearly within their scope.

entire past life", see *supra*, p. 11. The self-exorcism demanded by 27(a) is all the more pernicious because of its focus on political beliefs.

This question also is a test oath which violates the constitutional proscriptions against vagueness and against *ex post facto* laws and bills of attainder.

The oath contained in Question 27(a) forbids an applicant to have "any mental reservation" regarding his support of the Constitution. It suffers from the same constitutional deficiencies as subsection (a) of Question 27 because its unmistakeable purpose is the suppression of political *beliefs*. See also *supra*, pp. 38-42.

Subsection (a) of Question 26 alone sweeps more broadly into associational privacy than the interrogatories rebuked by the Court in *Schneider* v. *Smith*, *supra*. In contrast to the relatively limited inquiry, involved in *Schneider* concerning membership in 250 organizations, Question 26(a) seeks an applicants' affirmation or denial of any association, no matter how stale,[64] with an unlimited number of organizations (lawful and unlawful) whose purposes he must guess at his peril.

The Court's conclusion in *Shelton* v. *Tucker*, *supra*, at 490 is equally applicable to Question 26(a)'s sweeping inquiry, for it plainly constitutes a "comprehensive interference with associational freedom [which] goes far beyond what might be justified in [or remotely relevant to] the exercise of the State's legitimate inquiry into the fitness and competency" of applicants to its Bar.

Question 26(a) suffers from other constitutional infirmities in addition to the invalidity under *Shelton* v. *Tucker*, *supra*, and *Schneider* v. *Smith*, *supra*.

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[64] See *DeGregory* v. *New Hampshire Attorney General*, *supra*. This Court had occasion to consider a related aspect of staleness—that relating to the possibly changing purposes of organizations. *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, 380 U.S. 513.

First, the question is not restricted in its inquiry to organizations whose advocacy or teaching "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." See *Brandenburg* v. *Ohio, supra*, at 447 and n. 2, 448-449. Question 26(a) therefore fails to meet the requirement that "[s]tatutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitment to imminent lawless action." *Id.* at 449 n. 4.[65]

Second, another serious deficiency in Question 26(a) involves the terms "advocating", "teaching" and "any unlawful means" which are too vague.

The ambiguity in the terms "advocating" or "teaching" of governmental overthrow is comparable to the ambiguity in the terms "advocates, advises or teaches the doctrine" of forceful overthrow, found to be unconstitutionally vague in *Keyishian* v. *Board of Regents, supra*, at 599-601. Question 26(a) may well be taken by appellees to require an applicant to disclose membership in an organization which "merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Keyishian* v. *Board of Regents, supra* at 599-600.

The term "any unlawful means" [contained in both subsections (a) and (b) of Question 26] is particularly imprecise. See *Boyle* v. *Landry*, 280 F. Supp. 938, 955 (N.D. Ill. 1968); *Stewart* v. *Washington, supra* at 613. On its face it covers a myriad of offenses, some only misdemeanors or administrative violations. The element of vio-

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[65] Likewise, subsection (b) of Question 26 fails to take into account the factor of "imminent danger" or "clear and present danger" without which specific intent to further an organization's illegal aims is not criminal. See *Brandenburg* v. *Ohio, supra; Yates* v. *United States*, 354 U.S. 298, 321-322.

lence is not necessarily included; nor are all "unlawful means" imbued with the quality of moral turpitude.[66]

Third, an affirmative answer to 26(a) immediately requires the applicant to give a full and detailed explanation of such membership, and against the background of this explanation, answer subsection (b)'s query into "specific intent". In effect, admission of mere knowing membership creates, without more, a presumption or substantial inference of unlawful membership which the applicant bears the burden of disproving to the Committee's satisfaction. See Mr. Justice Black dissenting in the second *Konigsberg* case, 366 U.S. at 76. This quite naturally leads to a thorough review of the applicant's beliefs and entire political background.

This procedure has two principal defects:

(i) A presumption or substantial inference of unlawful membership derived from the mere fact of knowing membership is irrational and the applicant may not be constitutionally required to bear the burden of rebutting it.

The presence of First Amendment considerations requires strict application in this case of the principle announced in *Tot* v. *United States*, 319 U.S. 463 that a "presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed." *Id.* at 467-468. Cf. *Speiser* v. *Randall, supra.* Appellees' presumption has been undercut by this Court's declaration that it is "an assertion of arbitrary power" (*Wieman* v. *Updegraff*, 344 U.S. 183, 191) to automatically infer, as appellees have, "that all knowing members of the Communist Party, for example, share its illegal purposes or participate in its illegal conduct." *Schware* v. *Board of Bar Examiners, supra* at 245; See also *United States* v. *Robel,*

[66] It should also be noted that "membership" in or "association" with an organization advocating violent overthrow is a notoriously subjective concept. See *Killian* v. *United States*, 368 U.S. 231.

supra at 266 n. 16; *United States* v. *Brown, supra* at 456. Further as the Court stated in *Schneiderman* v. *United States*, 320 U.S. 118, 136:

> "Under our traditions, beliefs are personal and not a matter of mere association, and men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms of asserted principles."

In light of these findings, it plainly strains "the circumstances of life as we know them" (*Tot* v. *United States*, *supra* at 468) to find a taint, as have appellees, on every applicant who answers 26(a) affirmatively. Cf. *Boorda* v. *Subversive Activities Control Board*, — F. 2d — (D.C. Cir., decided Dec. 12, 1969).

(ii) Appellees' determination that an organization unlawfully advocates or teaches violent overthrow is not the product of an actual review of the organization's history or purposes made under the procedural safeguards demanded by *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123. Appellees, therefore, are free to assume that advocacy of violent overthrow is the purpose of any number of organizations; an assumption obviously influenced by the controversial nature of an organization or their own or some other governmental agency's political biases.[67]

Thus an applicant must take his chances in answering Question 26(a) that his evaluation of an organization's purposes coincides with that of the appellees'. In these circumstances an applicant must chose between over-disclosure or the unachievable: making certain, beforehand, that none of his associations could conceivably fall under the question's purview. Cf. *Speiser* v. *Randall, supra* at 526.

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[67] Prior to its revision in June, 1968 the First Department questionnaires directed applicants to affirm or deny membership in organizations listed as subversive by the Attorney General of the United States (A. 56).

Moreover, an applicant may not rationally be required to bear the burden of demonstrating the lawful character of an organization to which he belongs, where there is no evidence or support for appellees' assumption that it encompasses unlawful purposes.

An analogous procedure was considered in *Dombrowski* v. *Pfister*, 380 U.S. 479 and held invalid. In contrast to appellees' open-ended and fluctuating "designation" of organizations advocating violent overthrow, *Dombrowski* concerned the comparatively narrow list of Communist-front organizations compiled by the Attorney General of the United States, the Subversive Activities Control Board and the committees and subcommittees of Congress. Appellants in *Dombrowski* sought invalidation of a Louisiana statute creating criminal penalties for failure to register as a member of a Communist-front organization as defined by another statutory provision. Listing by the foregoing agencies was made presumptive evidence that an organization was a Communist-front; the presumption was not limited to organizations cited after compliance with the requirements of *Anti-Fascist Committee* v. *McGrath*, *supra*. The Court ruled that:

> "A designation resting on such safeguards is a minimum requirement to insure the rationality of the presumptions of the Louisiana statute, and in its absence, the presumptions cast an impermissible burden upon the appellants to show that the organizations are not Communist fronts." *Dombrowski* v. *Pfister*, *supra* at 496.

The same irrationality inheres in Question 26(a). In the absence of a prior determination made under the procedural safeguards outlined in *Anti-Fascist Committee* v. *McGrath*, *supra*, appellees may not reasonably presume that an organization in which an applicant held or holds membership advocates violent overthrow; nor may they reasonably compel the applicant to establish the lawful character of that organization.

3. The surveillance of an applicant's "home life" through third-party affiants clearly affronts the constitutional right to personal privacy. See *Griswold* v. *Connecticut*, 381 U.S. 479; *Stanley* v. *Georgia*, *supra*; *Katz* v. *United States*, *supra*.

> "The state simply cannot ask every affiant who supports an applicant for admission to the bar with whom the applicant lives or what the inside of his parents' home is like." (A. 196, Motley, J.).

Given the breadth of the appellees' stated interest in "a man's general experience in life, his family life, his associates, his business or other experience, his general reputation and the like" (*Matter of Brennan*, *supra* at 227) and its specific implementation in past and present third-party affidavits (A. 172-176 and *supra*, pp. 8-9), it is apparent that the roving search authorized here even surpasses the sweeping inquiry condemned in *Shelton* v. *Tucker*, *supra*.

Overall, New York's complex scheme governing admission to the Bar, like the State's similarly "complicated and intricate scheme" for ferreting out disloyal teachers condemned in *Keyishian* v. *Board of Regents*, *supra*, is by the "very intricacy of the plan and the uncertainty as to the scope of its proscriptions . . . a highly efficient *in terrorem* mechanism." *Keyishian* v. *Board of Regents*, *supra*, at 601, 604.

D. The Power to Judge the Morality of an Applicant's Political Activities Can Never be Adequately Circumscribed to Avoid Abuse

We believe that infringement of the First Amendment rights of applicants is not so much the fault of appellees as it is the unavoidable consequence of their undertaking. For there is substantial question as to whether the power to determine political fitness can ever be delegated and administered with constitutional precision. In *Schware* v. *Board of Bar Examiners*, *supra*, this Court found that

the standard for political disqualification requires a finding of moral turpitude in connection with illegal political conduct. *Id.* at 242-243. The difficulty in defining or implementing this standard is compounded by the further requirement that the moral implications of an applicant's political conduct must be assessed in terms not only of contemporary but future community values. See *Schware* v. *Board of Bar Examiners, supra; Hallinan* v. *Committee of Bar Examiners, supra.* Even if the appellees could exclude subjectivity from their judgments, the task of making such a determination is overwhelming especially in the area of political activities, where community standards are inevitably in a state of constant change. But, in reality, the power to review the morality of another's political conduct is an open invitation to caprice and arbitrariness.

E. The Majority Below Erred in Refusing to Consider Appellees' Past, Long-Standing Practices

The majority erred in denying appellants' motion for an injunction against the statutes and judicial rules as applied through the questions, practices and regulations which were in effect at the time these suits were commenced but which ceased or were withdrawn before the court below rendered its decision. As Judge Motley correctly points out, these questions, practices and regulations only exemplified the scope of the appellees' investigatory-adjudicatory powers authorized by the challenged statutes and judicial rules;

> "[t]he net effect of these changes and deletions . . . is to leave unchanged the First and Fourteenth Amendment challenge to the statutes. 'The substance of the statutory and regulatory complex remains and from the outset . . . [plaintiffs'] basic claim has been that they are aggrieved by its application.' *Keyishian* v. *Board of Regents of State of New York,* 385 U.S. 589, 596, 87 S. Ct. 675, 680, 17 L. Ed. 629 (1967). See also, *Dombrowski* v. *Pfister,* 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)." (A. 178)

Furthermore, there has occurred merely a cessation by the appellees of their long standing practices. Appellees have not and, as long as the statutory-judicial scheme exists, cannot give affirmative assurances that such practices will not reoccur. This Court has held that these circumstances, particularly in the First Amendment area, present an insufficient basis for denying an injunction. See *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-633; *Gray* v. *Sanders*, 372 U.S. 368, 376; *Moore* v. *Ogilvie*, 394 U.S. 814; *Carroll* v. *President and Commissioners of Princess Anne County*, 393 U.S. 175; *United States* v. *Concentrated Phosphate Export Assn.*, 393 U.S. 199.

The history of application of the challenged statutes and judicial rules demonstrates that this complex scheme does not contain adequate standards to confine the cast of appellees' investigative net within constitutional boundaries. In effect, the apparent validity of these provisions on their face has been thoroughly undermined by their unconstitutionally sweeping application over a period of decades under the tacit, if not express, sanction of the New York Court of Appeals.

We believe that under these circumstances the statutory-judicial scheme should be treated as invalid on its face. An injunction should issue restraining the enforcement of the challenged statutes and judicial rules until they are revised expressly to provide for procedural safeguards and substantive limitations.

CONCLUSION

The judgment appealed from should be reversed to the extent it fails to grant all the relief requested.

Respectfully submitted,

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February 26, 1970

APPENDIX A

Statutes and Judicial Rules Involved

New York Civil Practice Law and Rules

Article 94—Admission to Practice

RULE 9401. Committee

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

RULE 9404. Certificate of character and fitness

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his present and such past places of actual residence as may be required by the committee and the appellate division, listing the street

and number, if any, and the period of time he resided at each place.

RULE 9406. Proof

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

JUDICIARY LAW § 90(1)(a):

§ 90 Admission to and removal from practice by appellate division; character committees.

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall

have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

NEW YORK JUDICIARY LAW: Appendix:

Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

Rule VIII. Proof of Moral Character.
VIII-1. General Regulation.

Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2. Supporting Affidavits.

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

VIII-4. Discretion of Appellate Division.

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~686~~ 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,
Defendants-Appellees.

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Sec. 466 .....

New York Civil Practice Law and Rules,
Rule 102 3,
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Rules of New York Court of Appeals,
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U. S. Constitution,
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First Amendment 16

OTHER AUTHORITIES

18 Lawyers Guild Review, 60 n. 19 10

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 696

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,
Plaintiffs-Appellants,

v.

UPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Jurisdiction

The judgment of the Statutory District Court, convened rsuant to 28 U.S.C. § 2281, was rendered on June 16, 9 (225a-28a). On January 12, 1970, this Court noted

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probable jurisdiction over this appeal. Appellees sugges
that the appellee courts were not subject to the jurisdictio
of the District Court under 42 U.S.C. § 1983 and are no
properly subject to the jurisdiction of this Court on
appeal.

Questions Presented

1. May the New York Courts constitutionally impose,
as a condition for admission to the Bar, a requirement
that applicants possess "the character and general fitness
requisite for an attorney and counsellor-at-law", when such
a requirement has existed for many years and has been
construed repeatedly by the New York Courts?

2. May the New York Courts, and Committees on Char-
acter and Fitness appointed by them, in an attempt to
establish whether applicants for admission to the Bar can
in good faith take an oath to support the Constitution of
the United States, inquire as to their knowing affiliation
with organizations advocating the violent overthrow of the
United States government and as to whether their partici-
pation was with the specific intent to further such aims?

3. Is a statutory directive to the New York Courts con-
stitutional which directs that no person shall be admitted
to the Bar unless "he believes in the form of the govern-
ment of the United States and is loyal to such govern-
ment", when the New York Courts have construed this
directive to require only that an applicant answer in-
quiries concerning his willingness to subscribe to the oath
of support for the Constitution?

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Statement of the Case

This appeal challenges, principally on the ground of alleged vagueness and overbreadth, the implementation of New York's requirements for admission to the Bar to the extent that applicants are required to complete certain questions on a written form of questionnaire promulgated by the Committees on Character and Fitness in two judicial departments of the State.

Admission to the New York Bar is entrusted to the four Appellate Divisions of the Supreme Court of the State of New York, two of which are appellees before this Court. Admission by an Appellate Division entitles the lawyer to practice before all of the courts of New York, including the Court of Appeals of the State of New York. To assist in processing applicants for admission to the Bar each Appellate Division is authorized to establish a Committee on Character and Fitness, consisting of distinguished members of the Bar, who review the qualifications of applicants who have passed the written examination conducted by the State Board of Law Examiners. The Committees for the First and Second Judicial Departments, whose Appellate Divisions are parties before this Court, are also appellees here.

The statutory framework is contained in Section 90 of the New York Judiciary Law and in Rules 9401, 9404 and 9406 of the New York Civil Practice Law and Rules.* Thus Section 90 of the Judiciary Law provides that the Appellate Division will admit to the Bar of New York a person who has passed the examination conducted by the State Board of Law Examiners, upon being "satisfied that such

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*Civil Practice Rules, although originally enacted by the New York legislature, may be amended either by the legislature or by the New York Judicial Conference, consisting of specified judges of the New York courts, N. Y. Jud. L. § 229(3); N. Y. CPLR 102.

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person possesses the character and general fitness requisite for an attorney and counsellor-at-law."

Rule 9401 merely authorizes an Appellate Division to appoint a Committee on Character and Fitness "for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state." Rule 9404 provides that normally a person shall not be admitted to practice unless the Committee has certified the applicant as qualified, although the Appellate Division may by order admit persons to practice without such a certificate. The Rule further authorizes the appropriate committee, with the approval of the Appellate Division, to prescribe a form of written questionnaire which the applicant shall complete, including information as to the residence of such applicant.

Rule 9406 contains an admonition that the Committee shall not certify a person for admission as an attorney unless "he shall furnish satisfactory proof to the effect" that he is a citizen of the United States, has resided in New York for at least six months preceding his application, has complied with the applicable statutes and rules, and

> "that he believes in the form of the government of the United States and is loyal to such government."

These statutory provisions are implemented by the Rules of the New York Court of Appeals, particularly Rule VIII. This Rule interprets the statutory requirements of good moral character by providing that the applicant's duty to furnish evidence of "good moral character and general fitness requisite for an attorney and counselor-at-law" is to be accomplished by the submission of "affidavits of two reputable persons residing in the city or county in which [the applicant] resides," one of whom must be a New York attorney.* The affidavits must contain the basis for opin-

* Such requirement is also imposed as a condition for admission to the Bar of this Court. Sup. Ct. Rule 5.

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ion rendered by the affiants that the applicant is a person of good moral character, and those affidavits are not conclusive on the Committee. The Rule finally authorizes the Appellate Divisions to promulgate additional rules concerning admission to the Bar.

Finally, the statutory requirements here attacked are given further content by the judicial interpretation and the actual form of the written questionnaire submitted to each applicant (which questionnaire formed the basis for the principal analysis by the court below). Although appellants made sweeping attacks on the form of questionnaire in a manner which makes it difficult to understand precisely which questions are being challenged, we believe that only two questions are reasonably involved on this appeal. Question 26 deals with the applicant's possible participation in the attempted overthrow of the United States government, and Question 27 deals with the applicant's ability and willingness to subscribe to the constitutional oath of loyalty to the United States, implementing Rule 9406 as interpreted by the New York courts. These questions now provide as follows:

"26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

"(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn

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the government of the United States or any State or any political subdivision thereof by force, violence or any unlawful means?"

"27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

"(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?"

The two actions which were consolidated in the District Court were commenced by the appellants, seeking declaratory and injunctive relief against the Appellate Divisions and their committees in the First and Second Judicial Departments, and predicated upon a form of questionnaire which had been revised prior to the commencement of these actions. The form of questionnaire was further revised by the Appellate Divisions pending a hearing on the appellants' motion for summary judgment and the defendants' motion to dismiss the Complaints. The District Court, in an opinion by Circuit Judge Friendly, found three of the questions then contained in the form of questionnaire susceptible to constitutional infirmity: 27(a) on the ground of vagueness; and the others because they were excessively broad (A-164 to A-167). One of these questions was deleted by the Appellate Divisions and the other two, set forth above, were substantially revised by the Appellate Divisions, and Question 27(a) was further revised by the District Court, prior to the entry of final judgment. The appellants, however, press their attack in large part upon the various forms of questionnaire which had been discontinued by the Appellate Divisions prior to these actions, or immediately after their com-

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mencement. Appellants also continue to assail their conception of the system of personal interviews conducted of applicants by members of the Committee on Character and Fitness, alleging without any evidentiary support in the record that such interviews are indiscriminate invasions of their personal and political lives. As Judge Friendly noted below (167a-68a) no evidence of this was submitted to the District Court and no reason exists for not assuming that the scope of the personal interviews will be limited by the permissible scope of the written questionnaire.

Summary of Argument

The judgment of the District Court should be affirmed, but limited to a mandate involving the appellee Committees on Character and Fitness. The New York courts now parties before this Court are not "persons" within the meaning of the Civil Rights Act, and are not subject to suit in either of the two cases now involved on this appeal.

On the merits, it is manifest that the New York statutory framework governing admission to the Bar places no burden of proof upon an applicant, but merely requires that an applicant initially come forward with some specific evidence as to his character and fitness to be a member of the New York Bar. This burden is specified in Rules of the New York Court of Appeals as requiring only that an applicant submit affidavits from two reputable persons, attesting to the applicant's character and fitness.

Similarly, an applicant's obligation to furnish proof of his support for the United States has been interpreted by the New York courts as requiring only support for the Constitution of the United States, and that "burden" is met simply by answering the two questions directed to that subject in the form of questionnaire submitted to each applicant.

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The interpretations placed on the standards for admission to the New York Bar by the courts of that State remove any reasonable question of vagueness or overbreadth. An applicant must have the "character and general fitness" relevant to the legal profession, and must be willing to support the Constitution of the United States. The statutory requirement that an applicant believe in and be loyal to the form of government of the United States has been clearly interpreted as requiring no more than willingness on the part of an applicant to subscribe to the constitutional oath.

There is also no overbreadth intruding upon protected rights of association or expression in the questions promulgated of applicants. The only question susceptible of such inquiry has been carefully drafted to track the language of the opinions of this Court as to the inquiry which a state may properly make of applicants. The questions do not, of course, reach a degree of precision which this Court has found necessary to sustain a criminal conviction, but no such prosecution has ever been threatened by New York.

The procedures governing admission to the New York Bar are precise and limited to protect legitimate rights of expression and association. Such was recognized by the statutory District Court and the judgment of that Court should be affirmed.

ARGUMENT

I.

This Court lacks jurisdiction over the appellee courts and the judges thereof.

The appellees argued before the District Court that these actions, predicated on the substantive rights conferred by the Civil Rights Act, 42 U.S.C. § 1983, were not within the jurisdiction of the federal court because the

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defendants are not amenable to suit, being courts of the State of New York and arms of those courts. That argument was rejected by the District Court (148a-50a), and the jurisdictional argument was not pressed in the Motion to Affirm filed with this Court. Nevertheless we submit that, at least as to the state courts and the judges thereof, no mandate of this Court should issue because those parties are not "persons" within the meaning of 42 U.S.C. §1983. See *Monroe* v. *Pape*, 365 U. S. 167, 187-92 (1960); *Zuckerman* v. *Appellate Division, Second Department* (2d Cir. Jan. 29, 1970, slip op. 1233).

While we think there is grave doubt that the Committees on Character and Fitness, being instrumentalities of the Appellate Divisions, are "persons" within the meaning of the Civil Rights Act, (see *Clark* v. *Washington*, 366 F. 2d 678, 681 [9th Cir. 1966]), this Court has entertained actions against that body without objection. *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96 (1963).

Apart from the immunity of judges from damage actions involving acts performed under color of their judicial office, appellees submit that it is unseemly and inconsistent with the doctrine of federalism for the courts of New York to be called before a federal court as defendants.

II.

No unconstitutional burden of proof is placed upon any applicant for the bar.

One of the main attacks leveled by appellants is directed to the burden of proof allegedly placed upon each applicant, the argument being that an applicant has an undefined burden of establishing his own good moral character and fitness. This finds no support in the statutes or rules. Section 90 of the Judiciary Law requires only that the Appellate Division *be satisfied* that an applicant is qualified, and Rule VIII of the Court of Appeals Rules governing

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Admission of Attorneys merely requires the production of two affidavits to meet the initial burden of demonstrating character and fitness. As this Court has held in *Konigsberg* v. *State Bar*, 366 U. S. 36, 53-56 (1961), the State may legitimately place upon an applicant for admission to the Bar the initial burden of coming forward with *some* evidence of his fitness to be an officer of the Court. In fact, the Court of Appeals Rule is explicit in describing precisely how that burden is to be met, and no one can seriously contend that any substantial burden is thereby imposed.

Moreover, no decision is cited by the appellants, in the score of cases advanced by them, where any applicant has been denied admission to the Bar on the basis that evidence of good moral character was missing.* In each instance the propriety of the Court's refusal to admit the applicant was reviewed solely on the basis of the adequacy of the evidence of bad moral character found by the Committee.

The only other element upon which an issue of the burden of proof may be raised is with respect to Rule 9406, requiring the applicant to "furnish satisfactory proof" of various matters. No issue is raised with respect to the requirement that a person must have been an actual resident of New York for at least six months before being admitted to the Bar, or that proof of such residence may initially placed upon the applicant.**

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* Indeed, the fact remains, as conceded in 18 *Lawyers Guild Review*, at 60 n. 19, "denials, on character grounds, in case of student applicants, are extremely infrequent."

** Applicants continue to object to a form of affidavit which they entitle "Home Life", the present form of which is in the record (121a-22a; 139a-40a). These forms of affidavit serve two purposes: to substantiate the opinion of the affiant as to the applicant's moral character, by showing the basis upon which the affiant has rendered his opinion, and to substantiate to the extent possible the applicant's New York residence. The questions directed at visits to the applicant's home are obviously designed to determine merely whether the affiant is a personal or business acquaintance of the applicant, and whether any home visits are to the New York address given by the applicant in the questionnaire.

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Rule 9406 is not self-executing and does not apply directly to individual applicants for admission to the Bar, or law students who anticipate such status. Rather it constitutes a direction to the Appellate Divisions and their committees of certain conditions which must be met before admission is granted. Rule 9406 is therefore not a statute susceptible to a vagueness analysis standing by itself, but must be viewed in its reasonable context together with the implementing interpretations placed upon it by the courts. The proof to be furnished by applicants is identified in the form of a questionnaire and affidavits to be submitted in support of the application, which clearly establish that the only burden of proof is merely one of coming forward with historical data and character references. The interpretation of the particular conditions, as, for example, the meaning of the mandate in Rule 9406(1) of belief in and loyalty to the United States, is given its content and interpretation by the implementing questionnaire.

Nowhere in the record is there any evidence to support the appellants' repeated assertions that the burden of proof, as distinguished from the burden of coming forward, rests upon a Bar applicant at any stage. That was the conclusion of the District Court (152a) and there is no reason for this Court to assume that New York intends such a burden in the absence of "unequivocal indication" that such a burden has been imposed. *Konigsberg* v. *State Bar,* 366 U. S. 36, 55 (*supra*).

III.

The statutes are not vague or overbroad.

The statutes and rules contain only two references which could reasonably be subject to any attack on vagueness grounds: the definition of "moral character and fitness" and the requirement that an applicant "believe in the

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form of the government of the United States and is loyal to such government" (Rule 9406[1]). As those terms have been interpreted by the courts of New York they are clearly not susceptible to any reasonable attack.

This Court has noted that even an attack on the face of a statute on vagueness grounds must be considered with the interpretive gloss put on such a statute by the state courts. See *Baggett* v. *Bullitt*, 377 U. S. 360, 369 (1964). Both of the statutory elements considered above have been interpreted by the New York courts, in decisions of those courts and in the interpretation placed on the statutory delegation to the Appellate Divisions as implemented in the form of questionnaire.*

The New York Constitution provides for an oath of support to it and the Federal Constitution (N. Y. Const., Art. XIII, § 1), and that oath is implemented by statute to be taken by each officer of the Court, including every member of the New York Bar (Judiciary Law § 466). Rule 9406, in requiring belief in and loyalty to the United States Government, has been interpreted by the Appellate Divisions as requiring nothing more than a statement of willingness to subscribe to the constitutional oath. That interpretation is reflected in Question 27 in the form of questionnaire, which reads as follows:

> "27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

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* This case presents the curious situation in which the bodies entrusted with definitive interpretation of the statutes being attacked are the very appellees before this Court. Thus we submit that if the statutes are sustainable upon the reasonable interpretation placed on them in this brief, appellants' attack must fail.

"(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?"

Question 27(a) was drafted by the District Court, and is not reasonably susceptible to attack. New York is certainly entitled to require of officers of its courts an oath of loyalty and support for the constitutions of the United States and of New York. That oath has already been upheld by this Court. *Knight* v. *Board of Regents,* 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd,* 390 U. S. 36 (1968).

Question 27(b) is phrased in the language of that constitutional oath, with the addition of the phrase "without any mental reservation," which the Court below noted is a phrase contained in the oaths taken by federal judges (162a), and the declaration of loyalty in addition to support for the Constitution. Such a question is certainly no different from the oath sustained in *Knight,* and no less definite than the oath prescribed in Article II, § 1 of the Constitution which requires of the President an oath to "preserve, protect and defend" the Constitution.

The questions are not only precise, but provide a clear and proper interpretation of the mandate of Rule 9406(1), interpreting the requirement of belief in and loyalty to the form of government of the United States as limited only to loyalty and support for the Constitution of our nation.*

Question 26 also deals with the ability of an applicant to take the constitutional oath upon admission, but the specific thrust of that question is slightly different from question 27. Question 26 is in two parts, the first of which requires identification of an applicant's *knowing* membership in organizations advocating the violent over-

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*This interpretation distinguishes one of the defects in *Baggett* v. *Bullitt,* which dealt only with loyalty to the *Government,* not Constitution of the United States.

throw of the United States. As phrased, question 26(a) obviously would not serve as the basis for denial of admission if an affirmative answer were given, but does serve to identify membership in organizations to which question 26(b) would then apply. Question 26(b) restricts the scope of inquiry to those organizations in which the applicant was a knowing member with the "specific intent" to further the advocacy of violent overthrow. As such the scope of inquiry is directed to only such membership as has been held by this Court to be a proper foundation for denying public employment. *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

This Court has consistently held that a state has a legitimate interest in inquiring of prospective lawyers and teachers as to their affiliation with organizations that advocate violent overthrow of the government. See, *e.g.*, *In re Anastaplo*, 366 U. S. 82 (1961); *Konigsberg* v. *State Bar*, 366 U. S. 36 (*supra*); *Beilan* v. *Board of Public Education*, 357 U. S. 399 (1958). Surely a state interest in preserving the integrity of the teaching profession is equaled by its interest in ensuring that officers of the Court, who in a real sense are representatives to the public of the rule of law, are not committed to the advocacy of violent overthrow of the state and federal governments.

As was recognized by this Court in *Konigsberg*, a state may inquire as to an applicant's membership in such organizations, and question 26(a) merely asks for the identification of any such membership. There is no suggestion that an affirmative answer to question 26(a), absent an affirmative answer to question 26(b), would result in denial

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of admission, although a refusal to answer either part could result in the denial of admission.*

Question 26 is phrased with the precision demanded by the opinions of this Court. There is no inquiry conducted by New York which would require the identification of all personal and political affiliations, such as is presented in *Stolar*, No. 75, or in *Baird* v. *State Bar*, No. 53. In each of those two cases the applicants have answered one of two questions: either they have identified all of their affiliations and refused to answer a question concerning membership in the Communist Party or other similar organizations *(Baird)*, or they have answered the question concerning membership in the Communist Party and refused to furnish an answer to a question directed to membership in all organizations (*Stolar*). New York has taken the position that broad inquiry into all membership is not relevant to admission (although disciplinary action taken against the applicant by an organization would be), but has taken the position consistent with the repeated decisions of this Court that a precisely worded inquiry into the applicant's possible association with organizations advocating violent overthrow is permissible.**

We recognize that there is a distinction between conduct which can serve as the basis of inquiry, where the refusal to permit such inquiry would serve as the ground for denial of admission, and conduct which could serve as the basis for criminal prosecution. *Keyishian* and *Elfbrandt* make clear that a state may inquire of individuals whether they have been members of organizations which advocate violent overthrow, if the individuals shared the specific intent to further such advocacy. Yet

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* No issue is presented in this case with respect to the effect which may be given by the Committee to invocation of the Fifth Amendment by an applicant.

** It is not even clear that an applicant who refused to answer question 26(a) but did answer 26(b) in the negative would be denied admission, although the decision in *Konigsberg* would justify such denial.

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Brandenburg v. *Ohio*, 395 U. S. 444 (1969), makes clear that criminal prosecution for the conduct of advocacy of violent overthrow can only occur if the advocacy presented a clear and present danger of imminent lawless action. No applicant for the Bar of New York has been prosecuted criminally for answering the questionnaire, nor could he. But New York is certainly entitled, under *Keyishian and Elfbrandt*, to ask applicants whether they have subscribed to the specific intent to advocate violent overthrow.*

As interpreted by the form of the questionnaire, the statutes and rules have precise content and are in no way vague. The only issue really presented on this appeal is whether question 26 is overbroad in requiring the disclosure of associations protected by the First Amendment. The specific phrasing of the two subdivisions of that question makes it clear that the state has here attempted to be as precise as possible, and not to sweep within the scope of its inquiry conduct which is protected from scrutiny. Certainly New York has employed "precision of regulation" so as to reduce, to a *de minimis* point, any "chilling" effect on the exercise of protected rights by even the most hypersensitive of law students. See, *e.g.*, *Matter of Weiss*, 20 N Y 2d 696 (1967); *Matter of Anonymous*, 17 N Y 2d 674 (1966).

The only remaining issue subject to attack on the ground of vagueness is the general requirement that admission to the Bar of New York must be predicated upon a finding of good moral character and fitness—not in general, but specifically the moral character and fitness required of an attorney (Judiciary Law § 90; C.P.L.R. Rule 9401;

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* Appellants suggest that question 26(a) is more vague than one which refers to specific organizations listed as subversive by the Attorney General, since an applicant would at least know which organizations are covered. But the phrasing of the question only requires the identity of organizations which the applicant *knew* were advocating violent overthrow, not all organizations which in fact so advocated.

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New York Court of Appeals Rule VIII). If this Court were reviewing the question on a blank slate there might be some merit to the claim that "good moral character and fitness", even limited to the moral character and fitness required of an attorney, is unduly vague. But that phrase is not new or unique, and has been employed by the Bar of every state, to our knowledge, throughout the history of the Union. The District Court was unanimous in holding such a phrase constitutional (151a-52a; 190a-93a [dissenting opinion of Motley, D.J.]). As noted by the District Court, New York has given content to this phrase over the years in the decisions of its Courts, so that the phrase "character and general fitness" or "good moral character and fitness" have been limited to the absence of acts of moral turpitude, conduct evidencing lack of veracity or non-observance of fiduciary responsibility, or, as stated by Judge Motley, "dishonorable conduct relevant to the legal profession." (192a, n. 20)

This Court in *Konigsberg*, 366 U. S. at 40-44, noted that California's requirement "of good moral character could not well be drawn in question." New York's requirement is even more precise in limiting the character to traits relevant to the legal profession, which no one yet has suggested is an impermissible condition for admission into a profession which can survive only through the performance of duty with honor, candor, and the highest degree of fiduciary responsibility.*

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*The appellants raise other arguments, not advanced before the District Court, which deserve little comment. They intimate that requiring disclosure of arrests in question 23(b) unduly invades their privacy, apparently predicated on the argument that the committees will not understand the basis for some arrests due to the "generation gap", and because adverse publicity, as noted in *Watkins* v. *United States*, 354 U. S. 178 (1957), unduly impinges on their privacy. There is no evidence in the record whatsoever, and we doubt that it is a matter of judicial notice, that the committees are not fully understanding of contemporary political activity which may result in unjustified arrests. Moreover, the fact that these questionnaires are maintained in confidence removes any *Watkins* problem that an applicant might be injured by publicity concerning his prior arrests or associations.

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Conclusion

New York's procedures governing admission to the Bar, as interpreted by the New York courts, are not unconstitutionally vague and do not intrude upon the exercise of any rights guaranteed to potential lawyers under the United States Constitution.

The judgment appealed from should be affirmed.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., ET AL. *v.* WADMOND ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 49. Argued October 15, 1970—Decided February 23, 1971

Appellants challenge, primarily on First Amendment vagueness and overbreadth grounds, the system for screening applicants for admission to the New York Bar. To carry out the statutory requirement that the Appellate Division of the State Supreme Court "be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law," committees on character and fitness receive affidavits from two persons (one of whom must be a practicing attorney) acquainted with the applicant, and a questionnaire completed by the applicant. The committees also conduct personal interviews with each applicant. As the final step before admission to the Bar, the applicant must take an oath that he will support the United States and New York Constitutions. Appellants attack the procedure, not because any applicant has ever been unjustifiably denied permission to practice law in New York, but on the basis that it works a "chilling effect" upon the exercise of free speech and association of law students. The three-judge District Court found certain items on the questionnaire so vague, overbroad, and intrusive on applicants' privacy as to be of doubtful constitutional validity, but upheld the statute and rules as valid on their face, and with the exceptions noted, sustained the validity of the procedure. *Held:*

1. The "character and general fitness" requirement for admission to the New York Bar is not violative of the Constitution. Pp. 4–6.

(a) The requirement has been construed by appellees to encompass no more than "dishonorable conduct relevant to the legal profession." Pp. 4–5.

Syllabus

(b) The current third-party affidavits, setting forth the nature and extent of affiants' acquaintance with the applicant, do not infringe upon the applicant's right to privacy. Pp. 5–6.

2. New York's Rule that an applicant furnish proof that he "believes in the form of government of the United States and is loyal to such government," is not constitutionally invalid in light of appellees' construction that the Rule places no burden of proof on the applicant, that the "form of government" and the "government" refer solely to the Constitution, and that "belief" and "loyalty" mean no more than willingness to take the constitutional oath and ability to do so in good faith. Pp. 6–9.

3. The challenged items on the modified questionnaire are not constitutionally invalid, as one is precisely tailored to conform to this Court's decisions on organizational membership and association, and the other is merely supportive of appellees' task of ascertaining the applicant's good faith in taking the constitutional oath. Pp. 9–12.

4. New York's carefully administered screening system does not necessarily result in chilling the exercise of constitutional freedoms, and whether a different policy might be wiser rests with that State's policy-making bodies. P. 12.

299 F. Supp. 117, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring opinion, see No. 18, *In the Matter of the Application of Martin Robert Stolar*. BLACK, J., filed a dissenting opinion, in which DOUGLAS, J., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1970

Law Students Civil Rights Research Council, Inc., et al., Appellants, *v.* Lowell Wadmond et al. | On Appeal From the United States District Court for the Southern District of New York.

[February 23, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

An applicant for admission to the Bar of New York must be a citizen of the United States, have lived in the State for at least six months, and pass a written examination conducted by the State Board of Law Examiners. In addition, New York requires that the Appellate Division of the State Supreme Court in the judicial department where an applicant resides must "be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law." New York Judiciary Law § 90 (1)(a) (McKinney 1968).[1] To carry out this provision, the New York Civil Practice Law and Rules require the appointment, in each of the four Judicial Departments into which the Supreme Court is divided, of a committee or committees on character and fitness.[2] Section 528.1 of the Rules of the New

[1] The New York statute, rules, and affidavit forms relevant to the issues in this litigation are set out in the Appendix to this opinion.

[2] N. Y. Civ. Prac. Law & Rules, Rule 9401 (McKinney 1963); see also *id.*, Rule 9404.

These Rules, originally enacted by the State Legislature, may be amended either by the legislature or by the New York Judicial Conference. N. Y. Judiciary Law § 229 (3) (McKinney 1968); N. Y. Civ. Prac. Law & Rules, Rule 102 (McKinney 1963).

York Court of Appeals for the Admission of Attorneys and Counselors-at-Law requires that the character and general fitness specified in Judiciary Law § 90 "must be shown by the affidavits of two reputable persons residing in the city or county in which [the applicant] resides, one of whom must be a practicing attorney of the Supreme Court of this State."[3] The committees also require the applicant himself to fill out a questionnaire.[4] After receipt of the affidavits and questionnaires, the committees conduct personal interviews with each applicant. As a final step before actual admission to the Bar, an applicant must take an oath that he will support the Constitutions of the United States and of the State of New York.[5]

This case involves a broad attack, primarily on First Amendment vagueness and overbreadth grounds, upon this system for screening applicants for admission to the New York Bar. The appellants, plaintiffs in the trial court, are organizations and individuals claiming to represent a class of law students and law graduates similarly situated, seeking or planning to seek admission to practice law in New York. They commenced two separate actions for declaratory and injunctive relief in the United States District Court for the Southern District of New York, naming as defendants two Committees on Character and Fitness and their members and two Appellate Divisions and their judges.[6] The complaints

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[3] N. Y. Judiciary Law Appendix § 528.1 (McKinney Supp. 1970). This section, recently renumbered with no change in its wording, is referred to throughout the briefs and earlier opinions as Rule VIII of the New York Court of Appeals.

[4] Answers to these questionnaires are treated as confidential.

[5] N. Y. Judiciary Law § 466 (McKinney 1968); N. Y. Const., Art. XIII, § 1.

[6] The suits were brought under 28 U. S. C. § 1343 (3) (1964) and 42 U. S. C. § 1983 (1964).

attacked the statutes, rules, and screening procedures as invalid on their face or as applied in the First and Second Departments. A three-judge court was convened and consolidated the two suits.

In a thorough opinion, the court considered the appellants' claims and found certain items on the questionnaires as they then stood to be so vague, overbroad, and intrusive upon applicants' private lives as to be of doubtful constitutional validity.[7] It granted the partial relief indicated by these findings, approving or further amending the revised questions submitted by the appellees to conform to its opinion.[8] It upheld the statutes and rules as valid on their face and, with the exceptions noted, sustained the validity of New York's system. This appeal followed, and we noted probable jurisdiction. 396 U. S. 999.[9]

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[7] *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117. The appellees had already, both before and after the commencement of this litigation, eliminated or revised certain questions to which the appellants had originally raised objections. See *id.*, at 129 and n. 6.

[8] No cross-appeal has been taken from this partial grant of the requested injunction. We therefore have no occasion to consider whether the District Court's action was correct.

[9] Our jurisdiction of this appeal rests on 28 U. S. C. § 1253 (1964), the three-judge panel having been properly convened since the suits attacked state statutes as violative of the Federal Constitution and requested injunctive relief, 28 U. S. C. § 2281 (1964), which the District Court partially denied.

The appellees are the Committees on Character and Fitness of the First and Second Departments; their individual members; the First and Second Departments of the Appellate Division of the Supreme Court of the State of New York; and their individual justices. The appellees contend, as they did below, that the state courts and their justices are not within the jurisdiction of the federal courts because they are not "persons" within the meaning of 42 U. S. C. § 1983 (1964). The District Court rejected this argument, reasoning that the courts and the Justices were acting

We note at the outset that no person involved in this case has been refused admission to the New York Bar. Indeed, the appellants point to no case in which they claim any applicant has ever been unjustifiably denied permission to practice law in New York State under these or earlier statutes, rules, or procedures. The basic thrust of the appellants' attack is, rather, that New York's system by its very existence works a "chilling effect" upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements.

I

The three-judge District Court, although divided on other questions, was unanimous in finding no constitutional infirmity in New York's statutory requirement that applicants for admission to its Bar must possess "the character and general fitness requisite for an attorney and counsellor-at-law." [10] We have no difficulty in affirming this holding. See *Konigsberg* v. *State Bar*, 366 U. S. 36, 40–41; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 247 (concurring opinion of Frankfurter, J.). Long usage in New York and elsewhere has given well-defined contours to this requirement, which the appellees have construed narrowly as encompassing no more than "dishonorable conduct relevant to the legal profession," see 299 F. Supp., at 144 n. 20 (concurring and dissenting opinion of Motley, D. J.); see also *Schware* v. *Board of Bar Examiners, supra*, at 247 (con-

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in an administrative capacity and that an injunction here could have no inhibiting effect on the proper performance of judicial duties. 299 F. Supp., at 123–124. The appellees took no cross-appeal and did not press the point in their motion to affirm. We therefore pursue the matter no further.

[10] 299 F. Supp., at 124–125 (majority opinion of Friendly, Cir. J.); *id.*, at 143–144 (concurring and dissenting opinion of Motley, D. J.).

curring opinion of Frankfurter, J.). The few reported cases in which bar admission has been denied on character grounds in New York all appear to have involved instances of misconduct clearly inconsistent with the standards of a lawyer's calling.[11]

This Court itself requires of applicants for admission to practice before it that "their private and professional characters shall appear to be good."[12] Every State, plus the District of Columbia, Puerto Rico, and the Virgin Islands, requires some similar qualification.[13]

But, the appellants contend, even though the statutory standard may be constitutionally valid, the methods used by the committees to satisfy themselves that applicants meet that standard are not. Specifically, the appellants object to the terms of the third-party affidavits attesting to an applicant's good moral character. During this litigation, the appellees revised the affidavit forms in several respects. Whatever may have been said of the affidavits formerly used, we can find nothing in the present forms remotely vulnerable to constitutional attack. In the Second Department, for example,

[11] See, *e. g.*, *Matter of Cassidy*, 268 App. Div. 282, 51 N. Y. S. 2d 202, aff'd *per curiam*, 296 N. Y. 926, 73 N. E. 2d 41; *Matter of Portnow*, 253 App. Div. 395, 2 N. Y. S. 2d 553; *Matter of Greenblatt*, 253 App. Div. 391, 2 N. Y. S. 2d 569; *Matter of Peters*, 221 App. Div. 607, 225 N. Y. S. 144, aff'd *per curiam*, 250 N. Y. 595, 166 N. E. 337; cf. *Matter of Anonymous*, 17 N. Y. 2d 674, 216 N. E. 2d 612, 269 N. Y. S. 2d 454.

Compare also *In re Stolar*, *ante*, in which it appears that the petitioner there had previously been admitted to the New York Bar under the standards in use before the commencement of this litigation. There is, moreover, no indication that either Charles Evans Hughes or John W. Davis, despite the fears reflected in MR. JUSTICE BLACK's dissenting opinion, *post*, p. 8, encountered any difficulty whatever in gaining admission to the New York Bar.

[12] U. S. Sup. Ct. Rule 5 (1).

[13] See 5 1971 Martindale-Hubbell Law Directory, *passim* (103d ed. 1970).

an affiant is asked to state whether he has visited the applicant's home and, if so, how often. We think it borders on the frivolous to say that such an inquiry offends the applicant's "right to privacy protected by the First, Fourth, Ninth, and Fourteenth Amendments." It is the applicant who selects the two people who will sign affidavits on his behalf, and the committees may reasonably inquire as to the nature and extent of an affiant's actual acquaintance with the applicant.[14]

II

As stated at the outset of this opinion, New York has further standards of eligibility for admission to its Bar. An applicant must be a United States citizen and a New York resident of six months' standing. And before he may be finally admitted to practice, an applicant must swear (or affirm) that he will support the Constitutions of the United States and of the State of New York. Reflecting these requirements, Rule 9406 of the New York Civil Practice Law and Rules directs the Committees on Character and Fitness not to certify an applicant for admission "unless he shall furnish satisfactory proof to the effect" that he is a citizen of the United States, has resided in New York for at least six months, has complied with the applicable statutes and rules, and "believes in the form of the government of the United States and is loyal to such government."

The appellants do not take issue with the citizenship and mimimum residence requirements, nor with the items on the questionnaires for applicants dealing with these requirements. Their constitutional attack is mounted against the requirement of belief "in the form of" and

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[14] In the District Court the appellants also attacked—unsuccessfully—the practice of conducting personal interviews. They do not appear to press such objections here, either as to the practice generally or as to the conduct of any particular interviews.

loyalty to the Government of the United States, and upon those parts of the questionnaires directed thereto.

We do not understand the appellants to question the constitutionality of the actual oath an applicant must take before admission to practice. In any event, there can be no doubt of its validity. It merely requires an applicant to swear or affirm that he will "support the constitution of the United States" as well as that of the State of New York. See *Knight* v. *Board of Regents*, 269 F. Supp. 339, aff'd *per curiam*, 390 U. S. 36; *Hosack* v. *Smiley*, 276 F. Supp. 876, aff'd *per curiam*, 390 U. S. 744; *Ohlson* v. *Phillips*, 304 F. Supp. 1152, aff'd *per curiam*, 397 U. S. 317.[15]

If all we had before us were the language of Rule 9406, which seems to require an applicant to furnish proof of his belief in the form of the Government of the United States and of his loyalty to the Government, this would be a different case. For the language of the Rule lends itself to a construction that could raise substantial constitutional questions, both as to the burden of proof permissible in such a context under the Due Process Clause of the Fourteenth Amendment, *Speiser* v. *Randall*, 357 U. S. 513, and as to the permissible scope of inquiry into an applicant's political beliefs under the First and Fourteenth Amendments, *e. g.*, *Baggett* v. *Bullitt*, 377 U. S. 360; *Barenblatt* v. *United States*, 360 U. S. 109; *Speiser* v. *Randall*, *supra*, at 527; *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Sweezy* v. *New*

[15] Cf. U. S. Const., Art. VI, § 3:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."

See also U. S. Sup. Ct. Rule 5 (4), requiring an applicant for admission to the Bar of this Court to swear or affirm that he will "support the Constitution of the United States."

Hampshire, 354 U. S. 234. But this case comes before us in a significant and unusual posture: the appellees are the very state authorities entrusted with the definitive interpretation of the language of the Rule. We therefore accept their interpretation, however we might construe that language were it left for us to do so. If the appellees be regarded as state courts, we are of course bound by their construction. See, *e. g.*, *Baggett* v. *Bullitt*, *supra*, at 375; *Kingsley International Pictures Corp.* v. *Regents of the University*, 360 U. S. 684, 688; *Speiser* v. *Randall*, *supra*, at 519; *Terminiello* v. *Chicago*, 337 U. S. 1, 5–6. If they are viewed as state administrative agencies charged with enforcement and construction of the Rule, their view is at least entitled to "respectful consideration," *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96 (Cardozo, J.), and we see no reason not to accept their interpretation in this case.

The appellees have made it abundantly clear that their construction of the Rule is both extremely narrow and fully cognizant of protected constitutional freedoms.[16] There are three key elements to this construction. First, the Rule places upon applicants no burden of proof.[17] Second, "the form of the government of the United States" and the "government" refer solely to the Constitution, which is all that the oath mentions. Third, "belief" and "loyalty" mean no more than willingness to take the constitutional oath and ability to do so in good faith.

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[16] Rule 9406 does not itself directly impinge upon applicants; it is rather an instruction to the appellees, touching applicants only as filtered through the appellees' construction.

[17] As this case comes to us from the District Court, the sum total of what applicants must do in the first instance to satisfy any "burden" placed upon them by the Rule is simply to answer two questions on the questionnaire they submit to the appellee committees. These questions are discussed in Part III of this opinion, *infra*.

Accepting this construction, we find no constitutional invalidity in Rule 9406. There is "no showing of an intent to penalize political beliefs." *Konigsberg* v. *State Bar*, 366 U. S. 36, 54. At the most, the Rule as authoritatively interpreted by the appellees performs only the function of ascertaining that an applicant is not one who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." *Bond* v. *Floyd*, 385 U. S. 116, 132.

III

As this case comes to us from the three-judge panel, the questionnaire applicants are asked to complete contains only two numbered questions reflecting the disputed provision of Rule 9406.[18] They are as follows:

> "26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United

[18] The District Court ordered the elimination or revision of the following questions contained in the questionnaires at the time this litigation was commenced:

"26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ——— If your answer is in the affirmative, state the facts below.

"27 (a). Do you believe in the principles underlying the form of government of the United States of America? ———

"31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? ——— If the answer is 'Yes' state the facts." [In the Second Department the words "favorable or" did not appear.]

None of the above questions is in issue here.

States or any state or any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means? ——— If your answer is in the affirmative, state the facts below.

"(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?

"27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

"(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?" ———.

In dealing with these questions, we emphasize again that there has been no showing that any applicant for admission to the New York Bar has been denied admission either because of his answers to these or any similar questions, or because of his refusal to answer them. Necessarily, therefore, we must consider the validity of the questions only on their face, in light of Rule 9406 as construed by the agencies entrusted with its administration.

Question 26 is precisely tailored to conform to the relevant decisions of this Court. Our cases establish that inquiry into associations of the kind referred to is permissible under the limitations carefully observed here. We have held that knowing membership in an organization advocating the overthrow of the Govern-

ment by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be made criminally punishable. *Scales* v. *United States*, 367 U. S. 203, 228–230. It is also well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer. *Konigsberg* v. *State Bar*, 366 U. S. 36, 46–47. See also, *e. g.*, *United States* v. *Robel*, 389 U. S. 258; *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Garner* v. *Board of Public Works*, 341 U. S. 716.[19] Surely a State is constitutionally entitled to make such an inquiry of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government. The very Constitution that the appellants invoke stands as a living embodiment of that ideal.

As to question 27, there can hardly be doubt of its constitutional validity in light of our earlier discussion of Rule 9406 and the appellees' construction of that Rule. The question is simply supportive of the appellees' task of ascertaining the good faith with which an applicant can take the constitutional oath. Indeed, the "without any mental reservation" language of part (b) is the same phrase that appears in the oath required of all federal uniformed and civil service personnel. 5 U. S. C. § 3331 (Supp. V, 1970). New York's question, however,

[19] Division of question 26 into two parts is wholly permissible under *Konigsberg* v. *State Bar*, *supra*, which approved asking whether an applicant had ever been a member of the Communist Party without asking in the same question whether the applicant shared its illegal goals. Moreover, this division narrows the class of applicants as to whom the Committees are likely to find further investigation appropriate. For those who answer part (a) in the negative, that is the end of the matter.

is less demanding than the federal oath. Taking the oath is a requisite for federal employment, but there is no indication that a New York Bar applicant would not be given the opportunity to explain any "mental reservation" and still gain admission to the Bar.

IV

Finally, there emerges from the appellants' briefs and oral argument a more fundamental claim than any to which we have thus far adverted. They suggest that, whatever the facial validity of the various details of a screening system such as New York's, there inheres in such a system so constant a threat to applicants that constitutional deprivations will be inevitable. The implication of this argument is that no screening would be constitutionally permissible beyond academic examination and extremely minimal checking for serious, concrete character deficiencies. The principal means of policing the Bar would then be the deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits, and criminal prosecutions.

Such an approach might be wise policy, but decisions based on policy alone are not for us to make. We have before us a State whose agents have evidently been scrupulous in the use of the powers which the appellants attack, and who have shown every willingness to keep their investigations within constitutionally permissible limits. We are not persuaded that careful administration of such a system as New York's need result in chilling effects upon the exercise of constitutional freedoms. Consequently, the choice between systems like New York's and approaches like that urged by the appellants rests with the legislatures and other policy-making bodies of the individual States. New York has made its choice. To disturb it would be beyond the power of this Court.

The judgment is

Affirmed.

For opinion of MR. JUSTICE HARLAN, concurring in this case, see No. 18.

APPENDIX TO OPINION OF THE COURT

New York Judiciary Law (McKinney 1968): Article 4—Appellate Division.

§ 90. Admission to and removal from practice by appellate division; character committees.

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

New York Civil Practice Law and Rules (McKinney 1963): Article 94—Admission to Practice.

Rule 9401. Committee.

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

Rule 9404. Certificate of character and fitness.

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth in his usual handwriting all the information and data required by the committee and the appellate division justices, including specifically his present and past places of actual residence, listing the street and number, if any, and the period of time he resided at each place.

Rule 9406. Proof.

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months prior to the filing of his application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

New York Judiciary Law Appendix (McKinney Supp. 1970): Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

PART 528—PROOF OF MORAL CHARACTER

§ 528.1 General regulation.

Every applicant for admission to the bar must produce before a committee on character and fitness appointed by an Appellate Division of the Supreme Court and file with such committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor at law as provided in section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

§ 528.2 Supporting affidavits.

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its committee on character and fitness or otherwise.

§ 528.3 Certificate of Board of Law Examiners.

Every applicant who pursued the study of law pursuant to these rules must file with such committee on character and fitness his certificate from the State Board of Law Examiners showing compliance with these rules.

§ 528.4 Discretion of Appellate Division.

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

AFFIDAVIT WITH RESPECT TO CHARACTER OF APPLICANT

Supreme Court of the State of New York

APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application of

1. .....*

For Admission to the Bar

STATE OF
COUNTY OF } ss.:

2. ....., being duly sworn, makes the following statement:

3. Residence of affiant:

4. Nature of affiant's business:

5. Business address of affiant:

6. Length and nature of affiant's acquaintance with applicant:
   a. Residence of applicant:
   b. Persons with whom applicant lives (if known to affiant):

7. Affiant's conclusions as to applicant's moral character:

8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based:

9. IF THIS AFFIDAVIT IS MADE BY THE SPONSORING ATTORNEY, his sponsors' statement (see items 9 and 10 of instruction sheet) may be made here:

.....
(Signature)

Sworn to before me this .....
day of ....., 19....

(DO NOT FORGET TO HAVE ALL AFFIDAVITS NOTARIZED)

(NOTE: No back shall be put on Affidavits)

*Give name of applicant as it appears on the certificate of the State Board of Law Examiners.

NEW YORK SUPREME COURT,
APPELLATE DIVISION, SECOND
DEPARTMENT

IN THE MATTER OF THE
APPLICATION
of

.....
(Insert name of applicant)

for Admission to Practise as an Attorney and Counselor-at-Law

Form for Affidavit
of Character
and Residence

PLEASE NOTE

The answers to all questions are to be written, preferably in typewriting, by or under the direction of the affiant. It is desired that both the subject matter and the language of each answer shall be supplied by the affiant and not by the applicant. Nothing not personally known to affiant should be stated.

STATE OF.....
COUNTY OF..... } ss.:

....., the affiant, being duly sworn,
(Name of Affiant)

deposes and says that the answers to the following questions have been written by or under the direction of affiant, and that both questions and answers have been carefully read by affiant and that the several answers are true of affiant's own knowledge, except those stated to have been made on information and belief, and those stated to give the opinion or belief of affiant, and as to those answers, affiant believes them to be true.

1. (a) Home address of affiant (including County).
   (b) Business address.

2. Nature of business? (If a lawyer, state whether or not you are a practising attorney of the Supreme Court of the State of New York, and/or an attorney of any court or courts in any other state, country or jurisdiction, specifying each such state, country or jurisdiction, and give place of admission to the Bar, and approximate date of such admission.)

3. How long have you known the applicant personally?

4. State whether you are related to applicant by blood or marriage, or if there is any business, professional or similar relationship between you and the applicant or his family?

5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parenthesis, but the particular activities should be specified.

6. How often have you come in contact with applicant during the entire period of acquaintance? ("Frequently" or "often" or other indefinite statement is not a satisfactory answer.)

7. What is your conclusion as to applicant's moral character? (Reserve details for next question.)

8. State in detail the facts upon which your knowledge or opinion as to applicant's character is based.

9. Have you visited applicant's
   (a) parental home;
   (b) marital home, if any;
   (c) any other home or place of abode applicant may have had?

10. (a) How often have you visited the parental, marital or other home or place of abode of applicant? ("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)

    (b) During what years (stating approximate dates)?

    (c) At what addresses (listing them specifically)?

(Insert date) Sworn to before me this

day of 19

.....
(Affiant to sign here)

.....
(Attesting officer to sign here)

.....
(Official designation)

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1970

Law Students Civil Rights Research Council, Inc., et al., Appellants, *v.* Lowell Wadmond et al. } On Appeal From the United States District Court for the Southern District of New York.

[February 23, 1971]

Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

Of course I agree that a State may require that applicants and members of the Bar possess the good "character and general fitness requisite for an attorney." But it must be remembered that the right of a lawyer or Bar applicant to practice his profession is often more valuable to him than his home, however expensive that home may be. Therefore I think that when a State seeks to deny an applicant admission or to disbar a lawyer, it must proceed according to the most exacting demands of due process of law. This must mean at least that the right of a lawyer or Bar applicant to practice cannot be left to the mercies of his prospective or present competitors. When it seeks to deprive a person of the right to practice law, a State must accord him the same rights as when it seeks to deprive him of any other property. Perhaps almost anyone would be stunned if a State sought to take away a man's house because he failed to prove his loyalty or refused to answer questions about his political beliefs. But it seems to me that New York is attempting to deprive people of the right to practice law for precisely these reasons, and the Court is approving its actions.

Here the Court upholds a New York law which requires that a Bar applicant not be admitted "unless he shall furnish satisfactory proof" that he "believes in the form of government of the United States and is loyal to such government." Rule 9406, New York Civil Practice Law and Rules. It also approves certain questions about political associations and beliefs which New York requires all applicants to answer. From these holdings I dissent.

In my view, the First Amendment absolutely prohibits a State from penalizing a man because of his beliefs. *American Communications Association* v. *Douds*, 339 U. S. 382, 445 (1959) (BLACK, J., dissenting). Hence a State cannot require that an applicant's belief in our form of government be established before he can become a lawyer. As Mr. Justice Roberts said in *Cantwell* v. *Connecticut:*

> "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." 310 U. S. 296, 303–304 (1940).

Assuming that a New York statute could constitutionally delegate to a committee of lawyers the power to interrogate applicants for the Bar, the specific questions asked in this case are flatly inconsistent with the First Amendment. Questions 26 (a) and 26 (b) state:

> "(a) Have you ever organized or helped to organize or become a member of any organization or group of persons which during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ——— If your answer is in the affirmative, state the facts below.

> "(b) . . . did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State or political subdivision thereof by force, violence or any unlawful means?"

I do not think that a State can, consistently with the First Amendment, exclude an applicant because he has belonged to organizations that advocate violent overthrow of the Government, even if his membership was "knowing" and he shared the organization's aims. *Yates* v. *United States*, 354 U. S. 298, 339 (1957) (BLACK, J., concurring and dissenting). *American Communications Association* v. *Douds*, 339 U. S. 382, 445 (1950) (BLACK, J., dissenting). The First Amendment was intended to make speech free from government control, even speech which is dangerous and unpopular. And included within the protection of the First Amendment is the right of association; the right to join organizations which themselves advocate ideas. *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *Little Rock*, 361 U. S. 516, 527 (1960) (BLACK, J., and DOUGLAS, J., concurring); *Schneider* v. *Smith*, 390 U. S. 17 (1968). It therefore follows for me that governments should not be able to ask questions designed to identify persons who have belonged to certain political organizations and then exclude them from the practice of law.

Question 27 (b) asks: "Can you conscientiously and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?" In my view, this question also invades areas of belief protected by the First Amendment. Here the State seeks to probe an applicant's state of mind to ascertain whether he is "without mental reserva-

tion . . . loyal to . . . the Constitution." But asking about an applicant's mental attitude toward the Constitution simply probes his beliefs, and these are not the business of the State. *Cantwell* v. *Connecticut, supra; American Communications Association* v. *Douds, supra* (BLACK, J., dissenting); cf. *In re Summers*, 325 U. S. 561, 573 (1945) (BLACK, J., dissenting). For these reasons, I would reverse the judgment of the court below.

Wholly aside from my own views in dissent on what the First Amendment demands, I do not see how today's decision can be reconciled with other decisions of this Court, to which I shall refer later. The majority seeks to avoid this conflict by a process of narrowing construction. It states:

> "First, the Rule places upon the applicants no burden of proof. Second, 'the form of government of the United States' and the 'government' refer solely to the Constitution which is all that the oath mentions. Third, 'belief' and 'loyalty' mean no more than willingness to take the constitutional oath and ability to do so in good faith." *Ante*, at 8.

Thus despite the New York law's command that no applicant shall be admitted "unless he shall furnish satisfactory proof" of his belief and loyalty, the Court holds that this law places on him no burden of proof. The Court seems to assert that this "construction" avoids the problems posed by *Speiser* v. *Randall*, 357 U. S. 513 (1958), where we held that taxpayers in order to obtain tax exemptions could not be made to bear the burden of proving that they did not advocate violent overthrow of the Government. We there pointed out that such an allocation of the burden of proof "can only result in a deterrence of speech which the Constitution makes free" because the "man who knows that he must

bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.*, at 526. I do not believe the Court's narrowing construction here avoids the force of *Speiser* for in this case the District Court determined, and the appellees do not contend otherwise, that the New York law places on the applicant a burden of "coming forward with evidence" to satisfy the Committee. In my view, even this shifting of the burden of coming forward is impermissible in light of *Speiser* v. *Randall*. The Court held in *Speiser* that the defect in the California procedure was not only that the applicant bore the final burden of persuasion but that "when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until *the state comes forward with sufficient proof to justify its inhibition.*" *Id.*, at 528–529 (emphasis added). Although that case dealt with a tax exemption applicable to veterans, I can see no reason why the First Amendment should offer any less protection to applicants for admission to the Bar. If there is to be any difference at all, I should think a man's right to practice a profession should be accorded greater protection than his right to a tax exemption.

In Part III of its opinion the Court holds that New York may demand an answer to Question 27 (b) which asks whether the applicant is loyal to the Constitution "without mental reservation."[1] The majority reasons that an answer to this question may be required because it assists the Committee in assessing "the good faith with which an applicant can take the constitutional oath." This constitutional oath referred to is simply a pledge that the applicant will "support the

[1] The question is set out in full at p. —, *supra*.

Constitution of the United States" and of New York. I have no doubt whatsoever about the validity of this oath. See *Knight* v. *Board of Regents*, 269 F. Supp. 339, aff'd *per curiam*, 390 U. S. 36 (1968). But the issue here is whether New York can conduct an inquisition into an applicant's beliefs hoping to discredit the sincerity of his oath.

The question requires an applicant to affirm that he holds a certain belief, namely that he is "loyal . . . without any mental reservation . . . to the Constitution." This requirement is a quite different thing from New York's constitutional oath, which is similar to that required of the President and of applicants for admission to the Bar of this Court. The latter are promissory oaths in which the declarant promises that he will perform certain duties in the future. But Question 27 (b) does not require a promise of future action. It demands that an applicant swear that he holds a certain belief at that very moment, loyalty to the Constitution "without mental reservation." Aside from the serious vagueness problems which inhere in an oath that one is "loyal without mental reservation," cf. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), this is an attempt to deny admission to the Bar for failure to hold a certain belief. And we have consistently held that the First Amendment forbids a State to impose a sanction or withhold a benefit because of what a man believes. *Baird* v. *State Bar of Arizona*, *ante*, at —. *Ibid.*, concurring opinion of MR. JUSTICE STEWART, at —; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Cantwell* v. *Connecticut*, *supra*.

The majority's reasoning that Question 27 (b) may be employed to test an applicant's sincerity also flatly ignores our unanimous holding in *Bond* v. *Floyd*, 385 U. S. 116 (1966). There the Georgia House of Representatives excluded duly elected member Julian Bond on the

grounds that his statements criticizing the Vietnam war gave "aid and comfort to the enemies of the United States" and showed he did not support the Constitution. *Id.*, at 125. We held that exclusion on these grounds violated Bond's First Amendment rights. The appellees there argued strenuously that the First Amendment did not deprive them of power to test Bond's "sincerity." A three-judge Federal District Court, one judge dissenting, had accepted the appellees' theory. 251 F. Supp. 333 (1966). But we reversed the court below on the ground that the existence of an oath of office:

> "does not authorize a majority of state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution. Such a power could be used to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution." 385 U. S. 116, at 132.

The majority offers no reason why a "sincerity test" may be applied to New York Bar applicants when it may not be applied to Georgia legislators.

Perhaps the majority considers it relevant that New York has not yet actually excluded a Bar applicant because of his lack of "sincerity" and perhaps would not permit such an exclusion. Certainly the unanimous holding in *Bond* seems to compel the conclusion that they would not approve denial of admission to the New York Bar because of insincere oath taking. Yet the majority opinion seems to indicate that such exclusion is permissible. And if New York cannot constitutionally use the results of its "sincerity test" to exclude an applicant, what valid state interest can possibly be served by this inquiry into an applicant's beliefs? *Baird* v. *State*

Bar of Arizona, supra, at ——; *Gibson* v. *Florida Legislative Investigating Committee,* 372 U. S. 539 (1963).

The only other possible ground I can see for the majority's failure to follow *Bond* v. *Floyd* is that they feel a state legislator's First Amendment rights are more worthy of protection than those of an applicant to the Bar. If our form of representative government is to function as the Framers of our Federal and State Constitutions intended, the right of legislators to dissent freely is essential. But the Framers of the First Amendment intended also that its protection should extend not to some limited groups but to all citizens. Just as a democratic society needs legislators willing and able to criticize national and state policy, so it needs lawyers who will defend unpopular causes and champion unpopular clients. As I have pointed out in another case involving requirements for admission to the Bar, society needs men in the legal profession

> "like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed super patriots—men like Charles Evans Hughes, Jr., and John W. Davis, who while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party—men like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time

serving, government-fearing individuals is to humiliate it and degrade it." *In re Anastaplo*, 366 U. S. 82, 115–116 (1961) (BLACK, J., dissenting).

The Court also holds that New York may require applicants to answer Questions 26 (a) and 26 (b), which inquire about their associational activities and which have been set out in full at p. —, *supra*. I fail to see how the majority's approval of these questions can be reconciled with *Baird* v. *State Bar of Arizona*, *supra*, and *In re Stolar*, *ante*, at —. The majority's conclusion that these questions do not violate the First Amendment seems to be based on the assumption that the State may punish a man for knowing membership in an organization which advocates violent overthrow of the Government if he specifically intends to bring about such overthrow. On this assumption, the majority appears to conclude that since such conduct is criminally punishable, the State may inquire about it in order to exclude an individual who has been a member of one of these organizations with the requisite intent.

In *Baird* v. *State Bar of Arizona* and *In re Stolar*, we hold today that States may not require an applicant to the Bar to answer the question "have you been a member of any organization that advocates overthrow of the government by force?" Ohio recognized in *Stolar* that it could not exclude an applicant unless he had knowledge of the organization's aims at the time of his membership. However, it argued that its question was appropriate because it was merely a prelude to determining whether petitioner was a "knowing" member. We rejected that argument, and held that the First Amendment barred Ohio from demanding an answer to that question which required an applicant to supply information about political activities protected by the First Amendment. *In re Stolar*, *supra*, at —, and see *id.*, at — (STEWART,

J., concurring). Here the majority seems to concede that New York could not possibly exclude an applicant unless he had been a member of an organization advocating forcible overthrow, he knew of these aims, and *he had a specific intent to help bring them about. Ante,* at 10. Since even on the majority's theory New York cannot exclude an applicant unless *all* these requirements are met, why is the State permitted to ask Question 26 (a) which makes no reference to "specific intent"? In *Baird* and *Stolar* five members of the Court agreed that questions asked by Bar admissions committees were invalid because they inquired about activities protected by the First Amendment. Why then is the same result not required here?

It may be argued, of course, that Question 26 is sufficiently specific under the majority's standard because parts (a) and (b) *taken together* do include a "specific intent" requirement. But the Court's holding permits the knowledge and specific intent elements of Question 26 to be split into two parts. This allows the State to force an applicant to supply information about his associations, which, even under the majority's rationale, are protected by the First Amendment.

But even if Questions 26 (a) and 26 (b) were combined into one question, this would not satisfy the standards set by the Court in *United States* v. *Robel,* 389 U. S. 258 (1967), and *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969). *Robel* involved a section of the Subversive Activities Control Act barring members of "communist-action" organizations from defense employment. The section was struck down for overbreadth because it sought "to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." *Id.,* at 266. Thus the statute was found defective because it purported to bar persons on account of membership without regard to

whether they had been knowing members and had an intent to overthrow the Government. In that case we held the Federal Government could not bar a man from private employment in defense facilities unless he had engaged in conduct which could be criminally proscribed. We recognized that banning a man from employment is a form of civil punishment which must meet the requirements of the First Amendment. Cf. *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). And in *Brandenburg* v. *Ohio, supra*, a unanimous Court made clear that association with a group to advocate violence cannot be punished consistently with the First Amendment. In *Brandenburg* we struck down an Ohio statute which purported to make criminal the act of associating with an assembly to advocate violence to achieve political reform. The Court held that advocacy of violence or the joining with others to do so could not be proscribed "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. Clearly the New York questions are not nearly so narrowly drawn. New York seeks to inquire about membership in organizations "advising or teaching violent overthrow," for the purpose of excluding persons who knowingly belong to such organizations with the requisite intent. See Brief for Appellees, at 14–15. However, it does not specify that the organization's advocacy must have been "directed to inciting or producing imminent lawless action" and "likely to produce such action." Thus, for their failure to meet the *Brandenburg* requirements, the New York questions are overbroad. After our decision in *Robel*, it should make no difference that New York threatens to exclude people from their chosen livelihood rather than putting them in jail.

Perhaps the majority fails to recognize the force of *Robel* and *Brandenburg* because Bar applicants seek to

become members of a profession very important to the welfare of society . . . in the majority's words, a profession "dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government." *Ante*, at 11. Unfortunately, there is some support in our past decisions for the proposition that lawyers are such a special group that they should not enjoy the full measure of constitutional rights accorded other citizens. See, *e. g.*, *Cohen* v. *Hurley*, 366 U. S. 117 (1961), where this Court held that a New York lawyer could be disbarred solely for relying on his privilege against self incrimination and refusing to answer certain questions in a state investigation of professional misconduct. But I had thought that any such theory was clearly repudiated by our decision in *Spevack* v. *Klein*, 385 U. S. 511 (1967), which expressly overruled *Cohen*. In *Spevack* we held that New York could not disbar an attorney for taking the Fifth Amendment in a disciplinary proceeding, and we stated:

> "Like the school teacher in *Slochower* v. *Board of Education*, 350 U. S. 551, and the policemen in *Garrity* v. *New Jersey* . . . lawyers also enjoy first class citizenship." 385 U. S. 511, 516.

. . . . . .

I add only a few words, speaking as a member of the Bar. Quite obviously, its members should be men of high character and ability so that the Bar can fulfill the enormous responsibilities that face it. At the same time, its members and those who aspire to membership should not be disciplined or denied admission without full and unquestioned due process of law and protection of all their constitutional rights. Discipline or denial of admission should only take place after notice and hearing before an unquestionably impartial tribunal. I must repeat once again that consistently with due process of

law, no profession can be turned over to the whim of their present or prospective competitors to determine their right to practice. I think the District Court did magnificent service in stripping the New York Bar of much of its unbridled power over the admission of new members. My only regret is that it did not strip it further.

For the foregoing reasons I respectfully dissent from the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1970

Law Students Civil Rights Research Council, Inc., et al., Appellants, *v.* Lowell Wadmond et al.	On Appeal From the United States District Court for the Southern District of New York.

[February 23, 1971]

Mr. Justice Marshall, whom Mr. Justice Brennan joins, dissenting.

This litigation began with a comprehensive constitutional attack by appellants on long-standing state rules and practices for screening applicants for admission to the New York Bar.[1] During the course of the litigation some of these practices were changed by appellees; others were found wanting by the three-judge court below, and changed as a result of that court's opinion and its final order. Now we face the residuum of the appellants' original challenge, and the Court today ratifies everything left standing by the court below. I dissent from that holding because I believe that appellants' basic First Amendment complaint, transcending the particulars of the attack, retains its validity. The underlying complaint, strenuously and consistently urged, is that New York's screening system focuses impermissibly on the political activities and viewpoints of Bar applicants, that the scheme thereby operates to inhibit the exercise of protected expressive and associational freedoms by law students and others, and that this chilling effect is not justified as the necessary impact of a system designed

[1] The attack is upon rules of statewide application and practices administered by appellees in the First and Second Judicial Departments.

to winnow out those applicants demonstrably unfit to practice law.

As an abstract matter I do not take issue with the proposition that some inquiry into the qualifications of Bar applicants may be made, beyond such obvious threshold qualifications as residence or success in a regularly administered written examination. Accordingly, I would not upset the general rules which charter an inquiry as to the "fitness" of applicants, absent a showing not made here, that in practice the general rules work an impermissible result. But this is hardly the end of the case. For New York is not content with a politically neutral investigation into the fitness of Bar applicants to practice law. Screening officials are specifically directed by state law to assess an applicant's political beliefs and loyalties, and to scrutinize his associational and other political activities for signs that the applicant holds certain viewpoints. Such an inquiry, in my view, flatly offends the First Amendment, and state laws or administrative rules which license such an inqury must be struck down.

Rule 9406 of the New York Civil Practice Law and Rules prescribes: "No person . . . shall be admitted to practice . . . unless he shall furnish satisfactory proof to the effect . . . that he believes in the form of the government of the United States and is loyal to such government . . . ."[2] The Court rightly notes that Rule 9406 is addressed to the appellees, that is, to the investigating committees who pass in the first instance on applications for admission, and also to the relevant judicial department of the Appellate Division of the New York Supreme Court. Appellees, pursuant to Rule 9406, require Bar applicants to answer a questionaire now containing two questions designed to uncover

[2] The full text of Rule 9406 is printed *ante*, at —.

information about an applicant's political loyalties and associational affiliations. Question 27,[3] set forth in the margin, is one natural consequence of Rule 9406—part (b) of Question 27 commands an applicant to tell whether he is "without any mental reservation, loyal to and ready to support the Constitution." Question 26[4] requires an applicant to "state the facts" concerning his affiliation with any organization which he knew to advocate political change "by force, violence, or any unlawful means." Under the scheme set in operation by Rule 9406, appellees' job is to evaluate all the information turned up by the Questionaire, by required affidavits, by a personal interview with the applicant, and by other means, and then to determine whether an applicant has made "satisfactory proof" of the specified political beliefs and loyalties.

I have no doubt whatever that Rule 9406, if read to mean what it says, must fall as violative of settled con-

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[3] "27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

"(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States? ———."

[4] "26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means? ———. If your answer is in the affirmative, state the facts below.

"(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?"

stitutional principles, nor that any inquisition designed to implement a rule so written must equally be barred. Rule 9406 directs screening officials to probe the contents of an individual's political philosophy in order to ascertain whether he entertains certain beliefs as a matter of personal faith. The Rule, which charters an inquisition, fastens not upon overt conduct, nor even on activities which incidentally involve the public exposure or advocacy of ideas, but on personal belief itself. Yet it is a settled principle of our constitutional order that, whatever may be the limits of the freedom to act on one's convictions, the freedom to believe what one will "is absolute." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). As we said not long ago in *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969), "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The premise that personal beliefs are inviolate is fundamental to the constitutional scheme as a whole, see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Justice Brandeis dissenting), and the premise is not questioned even in cases where this Court has divided sharply over the extent of the First Amendment's protections. See, *e. g.*, *American Communications Assn.* v. *Douds*, 339 U. S. 382, 412 (1950) (Chief Justice Vinson for the Court), and *id.*, at 446–448 (JUSTICE BLACK in dissent). In the present case we have a rule of New York law which, as written, sanctions systematic inquiry into the beliefs of Bar applicants, and excludes from the practice of law persons having beliefs which are not officially approved.[5] This

[5] In addition to the defects mentioned at text, Rule 9406, as written, violates the principle of *Speiser* v. *Randall*, 357 U. S. 513 (1958). Rule 9406 provides that "no person shall be admitted" to the New York Bar "unless he shall furnish satisfactory proof" of required beliefs and loyalties. *Speiser* condemns placing evidentiary burdens on an applicant for a public benefit, when the benefit

inquiry and this criterion for exclusion are impermissible. However wayward or unorthodox a man's political beliefs may be, he may not be kept out or drummed out of the Bar or any other profession on that account.

The Court purports not to uphold—not to pass upon—Rule 9406 unvarnished. While conceding that the Rule, as it has been written, is constitutionally problematical, the Court asserts that it should be judged in light of the "extremely narrow" interpretation proffered by appellees, who are charged with administering the investigatory scheme contemplated by the Rule. According to the proposed administrative construction, Rule 9406 merely directs appellees to discover whether a Bar applicant is willing and able to promise that he will support the Constitutions of the United States and the State of New York. An oath promising support for the Federal and State Constitutions is required of persons admitted to the practice of law in New York, as of state officers generally.[6] The Court's argument, then, is that since the "support" oath may validly be required, see *Knight* v. *Board of Regents*, 269 F. Supp. 339 (SD NY 1967), aff'd *per curiam*, 390 U. S. 36 (1968), it is permissible for appellees to inquire into the willingness and the ability of applicants to take the support oath in full honesty and good faith—further, that since Rule 9406 has been "construed" to sanction no more than such

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may be denied because of the nature of the applicant's expressive and associational activities. Difficulties in proving the innocence of conduct may deter protected activity as much as a substantive standard which burdens privileged activity by terms.

[6] See N. Y. Judiciary Law § 466 and N. Y. Const. Art. 13, § 1, prescribing the following oath:

"I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of ————, according to the best of my ability."

an inquiry into applicants' sincerity, the Rule and the whole investigatory scheme of the Rule should be upheld.

There are several flaws in the Court's analysis. We are told that while the Rule may be too sweeping, the administrative construction is narrow enough, so the construction saves the Rule. But this argument cannot merit embrace unless, in the first instance, we are able to ascertain the meaning and the sweep of the administrative interpretation itself. The majority opinion points to no New York caselaw that shows what the proffered interpretation means. Nor, I think, can the Court comfortably point to appellees' past practice as a guide to the proper interpretation of Rule 9406. For the opinions below and the papers in this case reveal that these appellees, prior to the launching of this litigation, thought it their duty to make virtually unlimited inquiry into an applicant's associational, political, and journalistic activities.[7] Thus past administrative practice, which may

[7] Judge Motley's dissenting opinion below states portions of appellees' original, unrevised questionnaires that give some idea of appellees' original conception of their mission under Rule 9406. These questionnaires, utilized in the First or the Second Judicial Department, or both, asked *inter alia* for a list of all "unfavorable incidents in your life," a list containing "each and every club, association, society or organization of which you are or have been a member," a list of "any articles for publication" written by an applicant. An applicant was asked whether he had ever "contributed in any way or signed a petition for" any subversive organization, or had "participated in any way whatsoever" in such organization's activities. Each applicant was required to "state . . . in not less than 100 words" what he thought were the "principles underlying the form of government of the United States." See 299 F. Supp., at 137–139.

The revised questionnaires for the two Departments, the ones passed upon by the court below, had eliminated the most obvious constitutional defects of the original questionnaires. Still certain remaining questions were found wanting in the District Court's opinion—for example, the precursor to present Question 26. In fact, the only question in the present questionnaire which appears to

sometimes be helpful in clarifying the sweep of a doubtful law, cf. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96–97 (1935), in this case is no help at all in settling constitutional doubts concerning the reach of Rule 9406. Appellees' announcement that they will be more restrained, and will focus their inquiries on "sincerity," is of course entitled to the full respect of a reviewing court. Nonetheless I do not believe that Rule 9406 is saved by the announcement. At any rate, we certainly are not confronted by "long usage" giving "well-defined contours," see p. —, *ante*, to appellees' proposed construction of the challenged Rule.

A second defect of the Court's analysis is that any attempt to assimilate Rule 9406 to the "support" oath, for First Amendment purposes, must fail. The majority urges such an assimilation on the theory that " 'the form of the government of the United States' and the 'government' [terms of Rule 9406] refer solely to the Constitution, which is all that the oath mentions." Yet as MR. JUSTICE BLACK'S dissent today makes clear, the oath of constitutional support is promissory and forward-looking in nature, while the focus of the challenged Rule is quite different. The oath of constitutional support requires an individual assuming public responsibilities to affirm, in entirely familiar and traditional language,[8] that he will endeavor to perform his public duties lawfully. This is a far cry from Rule 9406, or Question 27 (b) of appellees' questionaires, both of which are designed to probe the personal political philosophy which an applicant entertains, his beliefs and loyalties and even his "mental reservations." To require the traditional oath

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reflect an "extremely narrow" focus on insincerity of a prospective oath taker—Question 27 (a)—was drafted by the District Court as part of its final order. Appellees' own proposed rewording was rejected.

[8] See U. S. Const. Art. VI, § 3; U. S. Sup. Ct. Rule 5 (4).

of constitutional support does not put government in the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints of individuals. For that reason the validity of the support oath is *sui generis*, and does not serve to justify the investigatory scheme set up by Rule 9406.

Surely it is a mistake to conclude that because a state may administer a support oath, it may therefore conduct an investigation into the beliefs and affiliations of Bar applicants in order to gauge the depth of their "willingness to take the constitutional oath and ability to do so in good faith." The seeming logic of this position was flatly repudiated in *Bond V. Floyd*, 385 U. S. 116 (1966). In that case the Court confronted the record of an actual inquiry into the "sincerity" of a prospective oath-taker, and the inquiry was found to be an impermissible encroachment on First Amendment freedoms. The Court noted that the power "to test the sincerity" of a person who must take an oath of constitutional support "could be utilized to restrict the right . . . to dissent from national or state policy . . . under the guise of judging . . . loyalty to the Constitution." *Id.*, at 132.[9]

[9] In the Motion to Affirm appellees rely on the following language in *Bond:* "Nor is this a case where a legislator swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." 385 U. S., at 132. This negative characterization of the facts in *Bond*, barely a dictum, should not be read to approve systematic inquiry into beliefs and affiliations in order to test "sincerity." Whatever a State may do when an oath taker himself contemporaneously "declares" or "manifests" contempt for the oath he is taking, it is quite a different matter to put the onus on a prospective oath taker to satisfy screening officials that his political activities and beliefs comport with the officials' notions of "sincerity." Indeed, Question 27 (a), which was written by the District Court, addresses the limited concerns of the *Bond* dictum and handles the remote risk that the oath-taking ceremony might be disrupted by an unwilling applicant. In pressing their search for sincerity beyond Question 27 (a), appellees cast

This is the very power which appellees claim under what the Court calls an "extremely narrow" construction of Rule 9406. It is a power of uncertain and dangerous dimension, and patently susceptible to censorial abuses.

For me the conclusion is inescapable that appellees' construction, far from saving Rule 9406, actually compounds its constitutional defects. The original vice of the Rule remains. State screening officials still are licensed to investigate an applicant's political activities and affiliations, and to probe his beliefs and loyalties and "mental reservations"—all this supposedly for the sake of protecting the integrity of the oath of constitutional support. The professed rationale of the enterprise may have been refurbished, but the search for true belief and unreserved loyalty remains. So construed, Rule 9406 is plainly overbroad. It sanctions overreaching official inquiries. It is impermissibly sweeping as a criterion for exclusion from the Bar. The Rule as interpreted suffers the very defects which this Court has found fatal to other schemes that have sought to predicate the grant or denial of public benefits on a person's political affiliations and viewpoints. See, *e. g., United States* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); cf. *Schneider* v. *Smith,* 390 U. S. 17 (1968).

Appellees' gloss compounds the defects of the Rule, in my view, because the proffered interpretation is vague in the extreme. It is of course conceivable that an inquiry into a Bar applicant's "sincerity" might be quite simple and definite in scope. Appellees suggest in the Motion to Affirm that some inquiry might be useful "to avoid the difficulty of having one individual demur to

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serious doubt on their own assertion that Rule 9406 places no evidentiary burden on an applicant, and thereby reinforce the claim that Rule 9406 violates the principle of *Speiser* v. *Randall,* 357 U. S. 513 (1958). See n. 5 *supra.*

the taking of [the support] oath at the very moment prior to admission." But this limited objective of avoiding an embarassing disruption of the admission ceremony is adequately handled by Question 27 (a), as drafted by the District Court. Plainly appellees have a good deal more in mind, as is shown by their insistence that Question 26 and Question 27 (b) aid in determining an applicant's "sincerity." These are the questions which focus on beliefs, loyalties, and affiliations. I cannot say that a Bar applicant, a law student, or anyone else is given fair warning as to the kind of political activities and affiliations that appellees mean to penalize as evidencing "insincerity." Thus in my view Rule 9406, as construed, is fatally vague. Standards of definiteness must be strict as to legal rules which trench on First Amendment activities. *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432–433 (1963). See *United States* v. *National Dairy Prod. Corp.*, 372 U. S. 29, 36 (1963). The irreducible vices of due process vagueness, arising when those who may be penalized by a legal rule cannot ascertain the rule's scope and avoid its burdens, see *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939), are inevitably heightened when the result is deterrence of protected activity. *Cramp* v. *Board of Pub. Instruc.*, 368 U. S. 278, 287–288 (1961). Appellants' fundamental complaint throughout this litigation has concerned the inhibitory impact of New York's screening system on the exercise of First Amendment rights. I agree that the chilling effect of Rule 9406, as construed, is exacerbated by the sort of vagueness which this Court has condemned on a number of hardly distinguishable occasions. See, *e. g.*, *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Cramp* v. *Board of Pub. Instruc.*, 368 U. S. 278 (1961).

A further word is required concerning the validity of Question 26 of appellees' questionnaire. The Court expressly approves Question 26, but fails to consider the relationship of the question to Rule 9406 itself, beyond noting that Question 26 "reflects" the Rule's command that an applicant's beliefs and loyalties be investigated. I believe it is a mistake to consider the question entirely in isolation from the investigatory scheme set up by the Rule. See *Whitehill* v. *Elkins*, 389 U. S. 54, 56–57 (1967) ("we must consider the oath with reference to [related provisions concerning subversives], not in isolation"). Question 26 is undeniably a key part of that scheme. The District Court saw Rule 9406 as an instruction to screening officials "to satisfy themselves through analysis of the factual data before them" that an applicant has requisite beliefs and loyalties. See 299 F. Supp., at 126. Question 26 is a potent device for uncovering "factual data" about an applicant's associational affiliations.

Question 26 (a) asks whether the applicant has "ever organized or helped to organize or become a member of" any association which he knew was "advocating or teaching" that any local, state, or federal governmental institution "should be overthrown or overturned by force, violence, or any unlawful means." Plainly this language covers a wide range of associational activities fully protected by the First Amendment, along with some conduct that may not be privileged. The question is not aimed at concerted activity of whatever sort oriented to the doing of illegal acts, but at affiliations with political associations that "advocate" or "teach" certain political ideas. All kinds and degrees of affiliation are covered: indifferent and energetic members alike, in well-disciplined organizations or in any transitory "group of persons." There is no specificity in the phrase, "overthrown or overturned by force, violence, or any unlawful

means." The language covers all advocacy of thoroughgoing political change to be brought about partly through unlawful acts—acts to be done now, or at some hypothetical future moment which may or may not occur—acts of bloody and atrocious terror, or conscientious action involving nonviolent disobedience to law. "Advocating or teaching" includes the most abstract sort of doctrinal discourse, and ideological utterances altogether ancillary to the political program of a given association.

Even when viewed in isolation from Rule 9406, Question 26 (a) reveals itself as an indiscriminate and highly intrusive device designed to expose an applicant's political affiliations to the scrutiny of screening authorities. As such, it comes into conflict with principles that bar overreaching official inquiry undertaken with a view to predicating the denial of a public benefit on activity protected by the First Amendment.[10] Three particular dif-

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[10] Part (a) of Question 26 is not rendered harmless by reason of the fact that part (b) limits somewhat the breadth of the question as a whole. In the first place, it must be remembered that neither part (a) nor part (b) states the operative criterion for excluding applicants on the basis of political affiliations—the criterion for exclusion, one of impermissible latitude, is given in Rule 9406 itself. Second, if all applicants who answer part (b) in the affirmative were therefore excluded, while those falling within part (a) only were admitted, the result would still be constitutionally problematical. See n. 11 *infra*. Third, overreaching inquiries are not cured simply by adding narrower follow-up questions. Obviously a State cannot hope to justify the sort of informational demand condemned today in *In re Stolar*, p. — *ante*, on the theory that the overintrusive inquiry is part of a series that culminates in a sufficiently narrow question. When the questioning is directed at the political activities and affiliations of applicants for a public benefit, the scope of questioning must be carefully limited in light of the permissible criteria for denying the benefit. *Schneider* v. *Smith*, 390 U. S. 17, 24 (1968); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). There is no

ficulties may be mentioned. First, Question 26 (a) is undeniably overbroad in that it covers the affiliations of those who do not adhere to teachings concerning unlawful political change, or are simply indifferent to this aspect of an association's activities. *Elfbrandt* v. *Russell*, 384 U. S. 11, 16–19 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 510–512 (1964). Second, no attempt has been made to limit Question 26 (a) to associational advocacy of concrete, specific, and imminent illegal acts, nor to associational activity which creates a serious likelihood of harm through imminent illegal conduct. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449 (1969); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 599–601 (1967). Third, would-be Bar applicants are left to wonder whether particular political acts amount to "becoming a member" of a "group of persons"—law students and others, when embarking on associational activities, must guess whether the association's teachings fall within the nebulous formula of Question 26 (a), or more to the point, whether their own assessment of an association's teachings would coincide with that of screening officials. There are penalties for failing to "state the facts" required by Question 26 (a) when the time to make application comes. The indefinite scope of Question 26 (a) expectedly operates to induce prospective applicants to resolve doubts by failing to exercise their First Amendment rights. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 493–494 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360, 367–370 (1964).

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justification for a requirement of overbroad disclosure that chills the exercise of First Amendment freedoms and is not tailored to serve valid governmental interests. See *Gibson* v. *Florida Legislative Investig. Comm.*, 372 U. S. 539, 546 (1963); *Bates* v. *City of Little Rock*, 361 U. S. 516, 524 (1960); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 462–463 (1958).

But whatever may be thought of Question 26 or either of its two parts standing alone,[11] it remains that the function of the question is to generate "factual data" about an applicant's political affiliations and activities to be judged ultimately by the operative standards of Rule 9406. Doubts concerning the propriety of the question are intensified when the question is viewed realistically as part of the investigatory scheme set up by the Rule. Cf. *Whitehill* v. *Elkins*, 389 U. S. 54 (1967). In "stating the facts" as required by Question 26, an applicant exposes himself to the grave risk that screening officials will find him wanting in respect of the requisite beliefs and loyalties. The impermissible latitude of Rule 9406 as a criterion for exclusion, in conjunction with overintrusive probing for details about an applicant's associational affiliations, creates an obvious *in terrorem* effect on the exercise of First Amendment freedoms by law students and others. The interwoven complexity and uncertain scope of the scheme heighten the danger that caution and conscientiousness will lead to the forfeiting of rights by prospective Bar applicants. See *Keyishian* v. *Board of*

[11] Part (b) of Question 26 limits part (a) in one respect: applicants affiliated with an association of the kind characterized in part (a), but who do not endorse the association's teachings concerning unlawful political change, need not answer part (b) in the affirmative. Naturally in other respects part (b) has the same sweep as part (a). "Specific intent" in this context means doctrinal agreement with the ideological tenets of part (a) associations—or, as appellees put it in their brief, "'specific intent' to further the advocacy" of drastic change to be brought about in part by unlawful means. Again the "unlawful means" might be nonviolent or bloodthirsty. The association might be a discussion group lasting for a week. The advocacy might be oriented to a far and contingent future or to the here and now; it might be innocuous or likely to cause imminent and serious harm. A prospective applicant might well be in doubt whether particular associational activity evinces "specific intent" or not—or whether, years later perhaps, screening officials would be willing to infer this state of mind.

Regents, 385 U. S. 589, 604 (1967). Appellees' attempt to save the whole scheme by restrictive construction of the Rule amounts, in my view, to little more than a declaration of beneficent intent, and we have said that good intentions "do not neutralize the vice" of vagueness and overbreadth. *Baggett* v. *Bullitt*, 377 U. S. 360, 373 (1964). The valid aims of appellees' screening efforts can be achieved without casting a pall on protected activity. But Question 26, viewed in light of Rule 9406, overreaches legitimate concerns and places an impermissible burden on the exercise of fundamental rights.

For the reasons stated I would strike down the portions of Rule 9406 discussed herein, as written and construed, and also Questions 26 and 27 (b). To that extent I would reverse the District Court.